Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Gen. No. 9389

October Term A. D. 1943
Agenda No. 4

3 I.A. 157

W. A. DOSS,

Plaintiff ~~and~~ Appellant

v.

N. E. HUTSON, CARL I. GLASGOW, E. J. HAWBAKER, R. P. SHONKWILER, BURL A. EDIE, Z. E. CORBETT and OLIVER D. MANN,

Defendants ~~and~~ Appellees

Appeal from the Circuit Court of Piatt County.

RIESS, J.:

Plaintiff-Appellant, W. A. Doss, filed a suit at law in the Cicuit Court of Piatt County against the Defendants-Appellees seekin recovery of damages alleged to have been sustained by the Plaintff as the result of a purported conspiracy to destroy his good me, professional standing and business interests and for allegemalicious prosecution of the Plaintiff by the Defendants. The Cot granted motions by all Defendants to dismiss the second amendecomplaint, as amended, on the ground that the same did not state its setting forth a cause of action. Judgment in bar of suit anfor costs was entered against the Plaintiff from which an appeal this Court was perfected.

The original verified complaint, consisting of four counts, alleged substance in Count I thereof that the Plaintiff had practiced l in the State of Illinois for a period of 29 years before the yea937, at which time the Supreme Court struck Plaintiff's name fr the roll of attorneys and he was disbarred from further practiof law in said State; (See In re: Doss, 367 Ill.570, 12 N. E. (2d) 6that on or about February 12, 1941, he became sole owner and pubher of a printed mimeographed publication called "The Libertress," which was published from his office in Monticello, Illinoand that between said date and May 16, 1942, approximately thirty eral issues and sixteen special issues were so published

and distributed by the Plaintiff, containing articles commenting on various civic and local matters composed and written by the Plaintiff, as well as matters pertaining to said disbarment of the Plaintiff and various cases that had arisen and been handled by some one or more of the above named Defendants, "some of which cases the said Plaintiff, directly or indirectly, was materially interested in." Said Count further recited that the Defendants combined and unlawfully conspired on or about April 1, 1941, to wilfully and maliciously obstruct the Plaintiff in the conduct of his business and the publication of said "The Liberty Press" by soliciting and urging an employe of the Plaintiff to cease employment in his office and to desist from cutting stencils or working about the operation of the mimeograph machine on which said paper was mimeographed and copied and by other ways maliciously and unlawfully seeking to hinder and prevent employees from working for the Plaintiff in and about the publication of said "The Liberty Press" and other lawful business of Plaintiff; that for five years prior thereto, Plaintiff had a good financial rating which, after commission of said wrongs, was injured and damaged, whereby Plaintiff sustained and sought recovery of actual damages in the sum of $150,000.00.

Count II realleged said paragraphs in substance and charged that the Defendants combined and unlawfully conspired to maliciously destroy the lawful business and financial credit of said Doss by telling his friends that he was crazy and would soon be in the asylum in Jacksonville, Illinois, meaning that he was mentally incompetent to take care of his business and was losing his mind.

Count III contains the additional charge that the Defendants unlawfully combined to procure an indictment against the Plaintiff before the October, 1941, Grand Jury in the Circuit Court of Piatt County, to which jury Defendants gave the opinion that Plaintiff was guilty of criminal libel; that there was no probable cause for the return of the indictments and that Plaintiff was not guilty of such charges and that the Defendants, to accomplish their purposes, procured a Special State's Attorney to investigate the alleged libelous articles of Plaintiff, W. A. Doss before said Grand Jury.

Count IV realleged portions of Count I and added a paragraph alleging unlawful conspiracy by the Defendants to have said W. A. Doss declared guilty of libel, with the malicious intent of injuring him and to have him fined or imprisoned therefor, by unlawfully, maliciously and wrongfully forcing the individual opinions of said Grand Jury, and causing them to return four indictments against said W. A. Doss, the same being cause numbers 3132, The People v. William Doss, libel, defamation of the memory of Lott R. Herrick, deceased; 3133 The People v. William A. Doss, indictment for libel of Honorable Burl A. Edie, County Judge; 3135 The People v. William A. Doss, indictment for libel and defamation of the memory of Carl S. Reed, Sr., deceased and 3134 The People v. William Doss, indictment for criminal libel of Carl I. Glasgow, State's Attorney of said County; that Plaintiff was tried on cause number 3134 and found guilty under the first count of the two count indictment charging criminal libel of said State's Attorney Carl I. Glasgow and found not guilty under the second count, and that an appeal was taken from said judgment of conviction. (Affirmed by this Court to which said cause was transferred by the Supreme Court in re The People, etc., v. William A. Doss, 318 Ill. App. 387, 48 N. E. (2d) 213.) The various Defendants filed motions to dismiss the above verified complaint, setting forth numerous grounds, including failure to state a cause of action or to set forth facts from which the various conclusions of the Plaintiff would follow or might be reasonably inferred. The motions to dismiss the complaint at law were allowed. An unverified amended complaint and second amended complaint was filed and later amended by leave of Court, each of which were dismissed on motions of all Defendants, followed by judgment and Plaintiff's appeal herein.

In the second amended complaint, as amended, the first count omitted reference to Plaintiff's disbarment proceedings, but again recited the publication of "The Liberty Press by Plaintiff printed in mimeographed form from his office in Monticello; that said publication was a lawfully published newspaper and enterprise wherein the Plaintiff lawfully commented on numerous [illegible]ses which Defendants believed to be damaging and injurious to th[illegible]s wherefore they maliciously conspired to interfere wi[illegible]lication; that

among the ways and means in which they unlawfully conspired was an endeavor to cause one of Plaintiff's employees, Ina Mae Glasgow, a stenographer who cut stencils for the mimeograph machine to cease employment for the Plaintiff; that Plaintiff operated a duck farm in Indiana and looked after the collection of various rents on property owned by him and clients in Piatt County, Illinois, with the details of which the said stenographer and bookkeeper Ina Mae Glasgow, one of three stenographers, was familiar; that her brother, Carl I. Glasgow, State's Attorney of said county, conspired to have her leave said employment and advised her that she would be subject to similar actions for libel by assisting Plaintiff in publishing articles of a criminally libelous nature; that prosecution of the Plaintiff for criminal libel was instituted against Plaintiff by said State's Attorney by indictment of a Grand Jury of said county, followed by certain contempt of Court proceedings against the Plaintiff (which latter arose out of communications sent by the Plaintiff to the Grand Jurors while in session, final disposition whereof appears in The People, etc., vs William A. Doss, 382 Ill. 307, 46 N.E. (2d) 984); that such advice and action by Carl I. Glasgow was intended to intimidate and force said Ina Mae Glasgow to leave the employment of Plaintiff as a part of said plan of the Defendants to maliciously, unlawfully and financially injure and damage Plaintiff; that as a result, said stenographer suffered a nervous breakdown and was obliged to take a vacation between May 1, 1941 and June 15, 1941, since which "she was not physically and mentally able to cary out the amount of her former stenographic work," which she otherwise would have carried on as a part of her regular duties; that in such publication of any of said "The Liberty Press" articles and issues, Plaintiff was not guilty of violating any criminal law of this State; that said representations to said stenographer that Plaintiff was guilty of criminal violations in said publication were false and made to induce her to leave his employment to the damage of Plaintiff.

The second amended count omitted prior reference to alleged statements concerning Plaintiff's mental condition and to three of the four indictments pending against Plaintiff as alleged in the original

verified complaint, but alleged that the various Defendants, including the State's Attorney, County Judge and other members of the bar of said county appearing as witnesses before the Grand Jury, and the Special Prosecutor Oliver D. Mann, whom the Circuit Court had appointed to represent the People therein, had unlawfully given their advice to the Grand Jury, while in session, to return an indictment against Plaintiff on account of such allegedly libelous articles concerning Carl I. Glasgow, which resulted in the return of the two count indictment against the Plaintiff on which trial was had and a verdict of guilty found under the first count and of not guilty as to the second count, a copy of which indictment is attached to the complaint; that after denial of a new trial, Plaintiff was adjudged guilty and given a six months sentence in the county jail under said judgment and conviction, from which an appeal was taken to the Supreme Court of Illinois; that Plaintiff was obliged to defend such suit and employ counsel and suffered damage to his financial credit and reputation in business on account of said alleged conspiracy and malicious prosecution.

The amended Count III of the complaint recites that said Oliver D. Mann, of Danville, Illinois, was appointed on the 15th day of December, 1941, by the Circuit Court of Piatt County as Special State's Attorney to investigate and prosecute the alleged libelous publications, so allegedly made, delivered, published and distributed by the Plaintiff, which appointment said Defendant Mann accepted and duly qualified thereunder. Then follows recitals concerning the collection, livestock and poultry business of the Plaintiff and concerning his bank and financial credit; that said Special State's Attorney Mann appeared at the October Term of the Piatt County Grand Jury and advised them in effect that it was their duty to find indictments against the Plaintiff on the alleged grounds that he was guilty of criminally libelous publications and that they did return an indictment in the cause referred to in Count II, which case was disposed of in the manner hereinabove recited.

The amended Count IV of the complaint recites the practice of law by the Plaintiff in Monticello for more than twenty-five years,

enjoyment of the good will and confidence of the business associates and neighbors in that vicinity; his prior service as State's Attorney and County Judge of Piatt County; that Defendants were engaged in the practice of law; the publication by Plaintiff of "The Liberty Press"; the alleged conspiracy of Defendants to prevent publication thereof; the alleged wrongful and unlawful advice by Carl I. Glasgow, as State's Attorney, to the Grand Jury to return an indictment under which Plaintiff was later tried and convicted; that said Special State's Attorney Mann appeared before said Grand Jury and that all Defendants gave their legal opinion wrongfully and unlawfully to the Grand Jury that under the law they should indict Plaintiff on charges set forth in said indictment, resulting in the return thereof against the Plaintiff; that no probable cause or sufficient facts as a matter of law existed which would warrant the finding thereof and the Plaintiff is not guilty of such charges; that Plaintiff as Defendant therein, was obliged to procure counsel and stand trial upon said indictment; that he was found guilty on the first count and not on the second count; that an appeal was taken to the Supreme Court from said judgment of conviction which cause was transferred to the Appellate Court of the Third District where the same is pending undetermined; a copy of the indictment, verdict and judgment of conviction upon said count in the trial Court was attached. The attached exhibits show a copy of the return by the Grand Jury charging W. A. Doss with said unlawful and malicious offense of printing and publishing criminally libelous articles in said publication in said "The Liberty Press," falsely defaming Carl I. Glasgow, said State's Attorney, in certain matters therein recited, the material portions of which are set forth in the opinion of this Court affirming said conviction in the case of The People of the State of Illinois v. William A. Doss, supra, to which Court said cause was transferred by the Supreme Court, as alleged in the complaint and the final disposition of which case, this Court, under the recitals of said complaint, will take judicial notice.

To the above complaint, and each count thereof, as amended, all of the Defendants filed motions to dismiss on the grounds that the

same did not state a cause of action at law against any of said Defendants; that the alleged attempt of Defendant Carl I. Glasgow to persuade his sister to change her employment does not state a cause of action against said Glasgow or any of the Defendants in favor of the Plaintiff; that the recitals of the complaint concerning an alleged conspiracy to procure an indictment against the Plaintiff by a Grand Jury and due return thereof, followed by verdict and judgment of conviction thereof, shows upon the face of the complaint and exhibits that there was probable cause for the institution of said proceedings; that such facts do not tend to show that said Carl I. Glasgow or Oliver D. Mann were guilty of malicious malfeasance in office in giving alleged advice to the Grand Jury; that the numerous conclusions as to Defendants being guilty of conspiracy or malicious prosecution are not predicated upon facts well pleaded and alleged in the complaint; that the complaint contains no allegation of the termination of the proceedings in favor of the Plaintiff but shows on the contrary that under said indictment, the Plaintiff was found and adjudged to be guilty of criminal libel; that the amended complaint shows that both Carl I. Glasgow as State's Attorney and Oliver D. Mann appointed as Special State's Attorney were acting within the proper performance of their official duties. Numerous other grounds for the dismissal of the complaint were set forth in the various motions of the Defendants. Plaintiff assigns error in the rulings and judgment of the Court in granting the motions to dismiss the complaint against Defendants and in entering judgment against the Plaintiff in bar of suit.

From the pleadings, it appears that this suit is predicated primarily upon alleged actions of the various Defendants in conspiring to injure the good name, reputation, financial standing and credit of Plaintiff and to injure and destroy his business by conspiring together and acting unlawfully and maliciously in prosecuting an indictment, and in the subsequent trial of Plaintiff upon a charge of criminal libel and in attempting to cause one of his employees to cease working for him in his business or in the publication of "The Liberty Press" wherein the

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allegedly libelous articles appeared upon which the indictment was founded and under one of the counts of which the conviction of Plaintiff duly followed.

While the complaint charges that Carl I. Glasgow acted unlawfully and maliciously in appearing or giving advice to the members of the Grand Jury or in bringing the allegedly libelous articles before them for consideration, it appears from the face of the complaint that Carl I. Glasgow was then acting as the duly elected and qualified State's Attorney of said County, whose duty it was under the law to bring before the Grand Jury any violation of the criminal code. Such actions by said officials under the allegations of fact set forth in the complaint are not susceptible of plaintiff's conclusions that the same constituted malfeasance in office, or were part of a criminal conspiracy to falsely and wrongfully indict and convict the Plaintiff and thereby destroy his good name, credit and business. It may be further pointed out that the advice given by the State's Attorney to his sister to quit the employment or to quit her work in connection with the publication of the alleged libelous articles in "The Liberty Press" for which Plaintiff was prosecuted, did not result in her ceasing such employment, but is only alleged to have lessened her efficiency therein. The remote and speculative effect of such advice, although the same was lawfully given, upon the efficiency of the employee in question in the alleged performance of her duty did not constitute a legal basis for recovery of alleged damages by the Plaintiff nor state a prima facie cause of action under the facts and circumstances set forth in the complaint.

It further appears from the complaint and exhibits thereto that the Special Prosecutor, Oliver D. Mann, was appointed by the Court in a lawful manner to act in presenting said matters to the Grand Jury and in prosecuting the cases before the Circuit Court of Piatt County; that he properly so acted in advising and appearing before the Grand Jury and in the prosecution of the indictment against the Plaintiff; that his actions therein clearly appear from the com-

complaint to have been within the proper scope and exercise of his authority as such Special Prosecutor.

An action for malicious prosecution is an action for damages by one against whom a criminal prosecution or civil suit has been instituted maliciously and without probable cause, after the termination of such prosecution or suit in favor of the Defendant therein. Shedd v. Patterson, 302 Ill. 355, 134 N. E. 705. In the case of Bonney v. King, 201 Ill. 47, 66 N. E. 377, it is held that in an action for malicious prosecution for a suit without probable cause, the complaint must allege that the suit, which is the foundation of the action, has been legally terminated. It is a well settled rule of law in this State that in a suit for malicious prosecution, the Plaintiff must allege facts showing termination of the prosecution favorable to him. Dixon v. Smith-Wallace Shoe Co., 283 Ill. 234, 119 N. E. 265. The complaint did not state a good cause of action for the malicious prosecution of a suit without probable cause. Lack of probable cause in the instant case was likewise negatived by the return of the indictment, verdict of jury and conviction of the Plaintiff of the offense charged, under the facts and circumstances shown and set forth in the amended complaint and exhibits. If malice and want of probable cause do not concur, an action for malicious prosecution cannot be maintained. Glenn v. Lawrence 280 Ill. 581, 587, 117 N.E. 757. Nor can want of probable cause be inferred from malice. McElroy v. Catholic Press Co., 254 Ill. 290, 98 N.E. 527.

Certain conclusions undertaking to connect other Defendants who were members of the bar and Judge of the County Court of said County, who appeared before the Grand Jury as witnesses in said above cause which terminated unfavorably to the Plaintiff, do not under facts alleged, tend to show an unlawful conspiracy or state a good cause of action.

We hold that the Trial Court did not err in granting the Defendants' motion to dismiss the complaint and in entering judgment against the Plaintiff in bar of suit and for costs. The judgment of the Circuit Court of Piatt County is therefore affirmed.

JUDGMENT AFFIRMED.

42644

GEORGE CHRISTIAN,
Appellant,

v.

PETER SMIRINOTIS,
Appellee.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is the fourth appeal from orders of the County court in this proceeding. The facts and questions involved in the initial proceeding are fully set forth in our first opinion, General No. 39093, reported in 290 Ill. App. 609, but not published in full. We were there called upon to decide whether the court had jurisdiction after the expiration of the term to set aside the order of dismissal of January 3, 1935 on defendant's motion and petition in the nature of a writ of error coram nobis, under section 72 of the Civil Practice Act (Ill. St. Bar Stats. 1935, ch. 110, par. 200), which is identical with section 89 of the former statute, and we held that the order of dismissal was entered through an error of fact, and upon the showing made by defendant should have been set aside on his motion to vacate. Accordingly, the order of the County court was reversed and the cause was remanded with directions to vacate the order of dismissal, to permit plaintiff to answer defendant's petition and for further proceedings.

When the cause was redocketed in the County court, plaintiff filed his answer on March 4, 1938 alleging various matters in reply to defendant's petition in the nature of a writ of error coram nobis and averring that the order of dismissal was not entered by mistake, that no error was committed by the clerk or the court, that no error of fact appeared in the proceeding, and averring specially various matters in reply to defendant's petition in the nature of a writ of error coram nobis. March 25, 1938 defendant filed a replication to

GEORGE SMALLTALK, appellant,	
v.	MCLEAN COUNTY DISTRICT COURT.
PETER E. LAMBERTS, appellee.	JOHN WALLIN.

MR. PRESIDING JUSTICE WALLIN DELIVERED THE OPINION OF THE COURT.

This is the fourth appeal from orders of the county court in this proceeding. The facts and questions involved in the initial proceeding are fully set forth in our first opinion, general No. 39093, reported in 290 Ill. App. 60, but not published in full. We were there called upon to decide whether the court had jurisdiction after the expiration of the term to set aside the order of dismissal of January 3, 1939 on defendant's motion and petition in the nature of a writ of error coram nobis, under section 72 of the Civil Practice Act (Ill. St. Bar Stats. 1937, ch. 110, par. 200), which is identical with section 89 of the former statute, and we held that the order of dismissal was entered through an error of fact, and upon the showing made by defendant should have been set aside on his motion to vacate. Accordingly, the order of the county court was reversed and the cause was remanded with directions to vacate the order of dismissal, to permit plaintiff to answer defendant's petition and for further proceedings.

When the cause was remanded in the county court, plaintiff filed his answer on March 9, 1939, denying various matters in reply to defendant's petition in the nature of a writ of error coram nobis and averring that the order of dismissal was not entered by mistake, that no error was committed by the clerk or the court, that no error of fact appeared in the proceeding, and averring specifically various matters in reply to defendant's petition in the nature of a writ of error coram nobis. March 27, 1939 defendant filed a replication to

the foregoing answer which the court evidently regarded as a motion to strike, and entered an order overruling the motion. Thereupon, without hearing any evidence, the court entered an order reinstating the cause and setting it for trial. Plaintiff appealed from that order and we held (Christian v. Smirinotis, Gen. No. 40378, 299 Ill. App. 616, not published in full) that it was clearly intended in our first opinion that the cause should proceed to hearing on the merits of the petition for a writ of error coram nobis and any answer thereto that might be filed by plaintiff, affirmed the order from which the second appeal was prosecuted, and indicated in our opinion that plaintiff should be allowed to file an answer to the petition and that the parties should then proceed to a hearing before the court on the merits of the petition and answer.

After the matter was redocketed in the County Court for the second time, plaintiff on June 2, 1939 filed an amended answer to the petition in which he covered, either by way of denial or admission, the various allegations in defendant's petition, but made one significant change in the averments relating to the dismissal of the appeal by the County court, i.e., in his first answer he had averred that the defendant knew or should have known that the appeal was dismissed January 3, 1935. We had indicated in one of our opinions that this averment was objectionable, and therefore when the cause was docketed in the County court for the second time, plaintiff in his amended answer averred that "the defendant at that term of the court knew and had ample means of knowing that his appeal was dismissed and that he, nevertheless, acquiesced in said final judgment of this court dismissing his appeal ***." Defendant thereupon moved to strike plaintiff's amended answer and the County court, after denying the motion and without hearing any evidence, entered an order allowing defendant's petition to vacate the order of dismissal,

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and set the appeal to be tried on its merits de novo on September 17, 1939. The third appeal (Gen. No. 41011, 311 Ill. App. 245, not published in full) was prosecuted from that order on the sole contention that defendant's motion to strike plaintiff's amended answer admitted all the averments well pleaded; that among them was the allegation that "defendant at that term of the court knew and had ample means of knowing that his appeal was dismissed and that he, nevertheless, acquiesced in said final judgment of this court dismissing his appeal ***," and the court having denied defendant's motion to strike the amended answer, should have dismissed defendant's petition instead of allowing it and setting the appeal for hearing de novo on September 17, 1939. We held that the averment of defendant's knowledge as contained in plaintiff's amended answer was not supported by any allegations of facts; although it averred that defendant had ample means of knowing that his appeal was dismissed and that he had acquiesced in the final judgment, no facts or circumstances were alleged to support this conclusion; and therefore it must be considered as nothing more than a conclusion of the pleader and not such an allegation as would be held to be admitted by the motion to strike. At the same time we indicated our view of the procedure that should follow when the cause was again redocketed in the County court, namely, that the court having denied the motion to strike plaintiff's amended answer, should set defendant's petition for a writ of error coram nobis and plaintiff's amended answer thereto down for hearing to determine whether or not the petition should be allowed, and pursuant to the hearing the court should enter an order either allowing the petition or dismissing it; that in the event the petition was allowed, an appropriate order should be entered to that effect, the order of dismissal of the appeal from the justice of the peace be vacated and the appeal be set

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down for hearing on its merits de novo, under the prescribed practice governing the hearing of appeals from justices of the peace.

It appears that following the third opinion and after the cause was again redocketed, a hearing was had before the County court, as indicated in our third opinion, during which evidence was adduced before the court only on behalf of defendant, to which plaintiff objected on the ground that no facts were alleged in the petition for writ of error coram nobis to give the court jurisdiction to vacate the order dismissing the appeal. However, that question was originally discussed and determined on the first appeal, and since plaintiff adduced no evidence but again relied upon the contention which had been advanced in the three prior appeals, namely, that the court lacked jurisdiction under defendant's petition for writ of error coram nobis, we think the court properly entered the following order at the conclusion of the hearing, from which plaintiff prosecutes the fourth appeal: The judgment will be "vacated and set aside and said cause reinstated and set for trial, December 15, 1942." The last hearing held in the County court afforded plaintiff an opportunity to adduce evidence in opposition to the petition, but he declined to avail himself of that privilege. Therefore, the court had no alternative except to allow the petition on the proof adduced, to vacate the judgment, reinstate the cause and order it placed on the trial call for hearing.

Accordingly, the order of the County court of November 10, 1942, should be affirmed, and it is so ordered.

ORDER AFFIRMED.

Sullivan and Scanlan, JJ., concur.

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It appears that following the third opinion and after the cause was again docketed, a hearing was had before the County court, as indicated in our third opinion, during which evidence was adduced before the court only on behalf of defendant, to which plaintiff objected on the ground that no facts were alleged in the petition for writ of error coram nobis to give the court jurisdiction to vacate the order dismissing the appeal. However, that question was originally dismissed and determined on the first appeal, and since plaintiff adduced no evidence but again relied upon the contention which had been advanced in the three prior appeals, namely, that the court lacked jurisdiction under defendant's petition for writ of error coram nobis, we think the court properly entered the following order at the conclusion of the hearing, from which plaintiff prosecutes the fourth appeal: "The judgment will be vacated and set aside and said cause reinstated and set for trial, December 13, 1942." The last hearing held in the County court afforded plaintiff an opportunity to adduce evidence in opposition to the petition, but he declined to avail himself of that privilege. Therefore, the court had no alternative except to allow the petition on the proof adduced, to vacate the judgment, reinstate the cause and order it placed on the trial call for hearing.

Accordingly, the order of the County court of November 10, 1942, should be affirmed, and it is so ordered.

ORDER AFFIRMED.

Sullivan and Beamian, JJ., concur.

42679

321 Ill. 158

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

FRANK L. NATHANSON (Impleaded),
Plaintiff in Error.

ERROR TO CRIMINAL COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty in the Criminal court of the crime of conspiracy and sentenced to the Cook County Jail for a term of one year and fined $2,000. The indictment upon which he was tried consisted of two counts: count 1 charged that defendant, Gladys McCall, Nancy Rosenbush and one John Doe conspired with each other and with divers other persons whose names were unknown and by means which were unknown to the grand jurors, to cause a large number of women to abort when the abortions were unnecessary for the preservation of life; the second count, which was dismissed, alleged a conspiracy to cause a particular woman named therein to miscarry. Gladys McCall, the receptionist in the doctor's office, was tried jointly with him and was acquitted by directed verdict at the conclusion of all the evidence. Nancy Rosenbush, the nurse, and a so-called interne who administered the anaesthetic and was designated in the indictment as John Doe, were not apprehended. Following sentence, Dr. Nathanson took the cause to the Supreme Court of Illinois by writ of error, claiming that he had been deprived of certain constitutional rights. The court held that no bona fide constitutional question had arisen, and accordingly transferred the cause to the Appellate court for review as to the other errors assigned. (People v. Nathanson, 382 Ill. 145.)

Inasmuch as defendant complains primarily that the evidence fails to prove a conspiracy, a brief summary of the evidence adduced upon hearing will be helpful to an under-

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

FRANK L. NATHANSON (Impleaded),
Plaintiff in Error.

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Defendant was found guilty in the criminal court of the crime of conspiracy and sentenced to the Cook County Jail for a term of one year and fined $2,000. The indictment upon which he was tried consisted of two counts: count I charged that defendant, Gladys McCall, Nancy Rosenbush and one John Doe conspired with each other and with divers other persons whose names were unknown and by means which were unknown to the grand jurors, to cause a large number of women to abort when the abortions were unnecessary for the preservation of life; the second count, which was dismissed, alleged a conspiracy to cause a particular woman named therein to miscarry. Gladys McCall, the receptionist in the doctor's office, was tried jointly with him and was acquitted by directed verdict at the conclusion of all the evidence. Nancy Rosenbush, the nurse, and a so-called interne who administered the anaesthetic and was designated in the indictment as John Doe, were not apprehended. Following sentence, Dr. Nathanson took the cause to the Supreme Court of Illinois by writ of error, claiming that he had been deprived of certain constitutional rights. The court held that no bona fide constitutional question had arisen, and accordingly transferred the cause to the Appellate court for review as to the other errors assigned. (People v. Nathanson, 382 Ill. 445.)

Inasmuch as defendant complains primarily that the evidence fails to prove a conspiracy, a brief summary of the evidence adduced upon hearing will be helpful to an under-

standing of the issues involved. Bernice Ceropski, one of the State's witnesses, testified that she was married to Chester Ceropski, knew defendant Dr. Nathanson and visited him at his office in Chicago on November 24, 1941. She told Nathanson that she was pregnant, having missed two of her menstrual periods, and that she suffered from nausea. In reply to Dr. Nathanson's inquiry as to why she wished to have an abortion, she told him that she and her husband were financially unable to maintain a child. Nathanson thereupon asked her how much money she had and she advised him that she had $35, and gave it to him. Thereupon Nancy Rosenbush gave her an enema and prepared her for the operating table. She was shaved and an anaesthetic was administered by the interne. When she regained consciousness from the anaesthetic she was given an injection in the thigh by Dr. Nathanson, and then taken to another room where the nurse gave her some pills, for which she paid $2. After she left the doctor's office she became ill, and the following day telephoned Nathanson and complained about her condition. She then returned to defendant's office, was given another enema and again anaesthetized by the interne. When she regained consciousness defendant again gave her an injection in the thigh. She further testified that Nathanson came to her house about 11:00 o'clock on the night before the trial and told her that he had given his lawyer $1,500 to give her, and endeavored to have her not prosecute the case.

Another witness, Muriel Jensen Minch, testified that she was a graduate nurse and had had a conversation with defendant at his office in the presence of her husband on the morning of December 3, 1941. She told him that her last menstrual period had been six weeks prior to that date, and asked him what method he employed in performing an abortion.

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He explained the procedure to her and she was then prepared and assisted to the operating table by the nurse. She was shaved by defendant and the interne administered the anaesthetic. When she regained consciousness she inquired whether it was all over, and the interne advised her that "Nothing was done. We got a call from the front." He told her to dress as quickly as possible, which she did, and was then taken upstairs to an apartment through a corridor leading from a door leading out of Nathanson's office, where she saw defendant, a Mrs. Walke, Miss Diamond, and the nurse. Defendant told them that if they would be quiet and stayed there awhile, they would be able to go without molestation after the police had left. Before leaving the apartment with Mrs. Walke, she told defendant she would telephone him if the police left, and ten minutes after leaving the building she telephoned Nathanson and advised him that the police were no longer there.

Betty Jane Diamond testified that she went to defendant's office December 3, 1941 with her father, where defendant made a physical examination. Her father then asked defendant if he would take care of her, and Nathanson replied that he would. Her father inquired how much it could cost and told Nathanson that he had $65 with him. Defendant wanted more money. Her father then left and she was taken in charge by the nurse, placed on the operating table, shaved and given an anaesthetic. Afterward she was dressed and taken upstairs to an apartment. While there she saw two girls leave the apartment and heard the interne tell them to call back after they left. She left the place by a different entrance.

Betty Jane's father, Frank Diamond, corroborated his daughter's testimony, and stated that Nathanson asked him for $100 but he told him he had only $60, and defendant then said that under the circumstances he would take it. He

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thereupon left the doctor's office and returned about 2:00 o'clock in the afternoon, and found the police there.

David Lichtenstein, a police officer, testified that he and Sergeant Mulhern procured a warrant and proceeded to defendant's office about noon on December 3, 1941. They were told by the receptionist to wait a moment. After waiting about an hour they forced their way into the office but found no one. After searching the place they found an archway leading to another building, and upon going in there they found a door leading to an apartment where they apprehended the defendant and Miss McCall. They took both of them to the Holy Cross Hospital, where Mrs. Ceropski was being treated by another physician following her visit to Nathanson, and she identified defendant in the presence of the two officers. Neither the defendant nor any witness on his behalf testified upon the trial and no evidence was adduced by him to deny the substantial testimony offered by the state.

Defendant concedes that a conspiracy may be established by circumstantial evidence, but he invokes the corollary of that rule which requires that the circumstantial evidence adduced to support a conviction must be such that the conclusion drawn therefrom excludes every reasonable hypothesis other than guilt, and that no conviction can be had where the evidence is as consistent with innocence as with guilt. Assuming that to be a correct statement of the law as set forth in the several authorities cited by defendant (Nestor Johnson Mfg. Co. v. Goldblatt, 265 Ill. App. 188; Marzen v. People, 173 Ill. 43; 15 C. J. S., Conspriacy, sec. 93, at p. 1150), we do not think the jury would have been justified in drawing from the undisputed evidence and the attending circumstances any fair inference that defendant was innocent. He discussed the contemplated abortions with at least three of the women who testified and accepted money from two of them for operations

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to be performed. That he, as well as the interne and nurse, had knowledge that the operations in which they assisted were illegal, may be fairly implied from the facts. Ochs v. People, 124 Ill. 399. If defendant and his assistants had been performing legal operations, it is difficult to understand why they should have tried to conceal their presence from the police and evade discovery. Their very conduct, as related by the several witnesses, carried a fair implication of guilt (Barron v. People, 73 Ill. 256), as did defendant's visit at the home of Mrs. Ceropski the evening before the trial in his endeavor, through the payment of money, to dissuade her from prosecuting the cause against him.

The contention that proof of pregnancy of the several women who called on him for abortions, was necessary, is likewise without merit. The indictment charged a conspiracy to commit the crime of abortion, and whether it was possible to commit such a crime is not pertinent to the issues because "There might have been the conspiracy, and yet it not be carried out." Ochs v. People, supra. In the latter case the court answered the other contention advanced by defendant that there was no proof of any agreement by quoting as follows from Archbold's Crim. Pr. and Pl. at p. 619: "'It is seldom proved expressly, nor can a case easily be imagined in which that is likely to occur, ***. In nearly all cases, therefore, the conspiracy is proved by circumstantial evidence, namely, by proof of facts from which the jury may fairly imply it. It is usual to begin by showing that the defendants all knew each other, and that a certain degree of intimacy existed between them, so as to show that their conspiring is not improbable; and if to this can be added evidence of any consultations or private meetings between them, then there is a strong foundation for the evidence to be subsequently given, namely, of the overt acts of each of the defendants in furtherance of the common

to be performed. That he, as well as the inform and nurse, had knowledge that the operations in which they assisted were illegal, may be fairly implied from the facts. Cobb v. People, 124 Ill. 329. If defendant and his assistants had been performing legal operations, it is difficult to understand why they should have tried to conceal their presence from the police and evade discovery. Their very conduct, as related by the several witnesses, carried a fair implication of guilt (Barron v. People, 73 Ill. 256), as did defendant's visit at the home of Mrs. Gropsini the evening before the trial in his endeavor, through the payment of money, to dissuade her from prosecuting the cause against him.

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design. But although the proof above mentioned is desirable, because it satisfies the jury as you proceed, and they are better able to apply the evidence of the overt acts when it is afterwards given, yet it is not essentially necessary, as the jury may imply the conspiracy of all from the overt acts of each.'"

From an examination of the record we are convinced that defendant was given a fair and impartial trial, free from any prejudicial errors, and therefore the judgment of the trial court should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Sullivan and Scanlan, JJ., concur.

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From an examination of the record we are convinced that defendant was given a fair and impartial trial, free from any prejudicial errors, and therefore the judgment of the trial court should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Sullivan and Scanlan, JJ., concur.

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321 I.A. 158

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
A. FRED KABANA,
Plaintiff in Error.

ERROR TO COUNTY COURT, COOK COUNTY.

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MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

A. Fred Kabana was convicted by a jury and sentenced to pay a fine of $500 and to serve 90 days in the County Jail for violation of the Medical Practice Act (Ill. Rev. Stat. 1943, ch. 91, sec. 2), upon an information consisting of five counts. Count I alleges that on March 6, 1940 in Chicago, Cook county, Illinois, defendant, having no license to practice the treatment of human ailments in any manner, "did then and there diagnosticate a supposed ailment of Charlotte Hermes *** as pressure and muscular rigidity in the upper part of her neck;" count II, after repeating the formal allegations of Count I, charges that defendant treated the supposed ailment of pressure and muscular rigidity by applying pressure to the upper part of the patient's neck with his fingers and hands and by moving and jerking her head upwards; count III charges that defendant suggested and recommended the application of pressure to the upper part of the neck of the patient with his fingers and hands and moving and jerking her head upwards with intention of receiving a fee of $2.50 therefor; count IV alleges that defendant caused his name to appear and be printed on the bottom of each of three printed booklets distributed to members of the public in the reception room of his office in Chicago - "HAY FEVER - WHAT WILL CHIROPRACTIC DO FOR IT?," "HEADACHES - WHAT WILL CHIROPRACTIC DO FOR IT?," "KIDNEY TROUBLE - WHAT WILL CHIROPRACTIC DO FOR IT?" - in the

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PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

v.

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Plaintiff in Error.

4H. PROSECUTION OF LIVING BY THE PRACTICE OF THE COURT.

A. Fred Kaban was convicted by a jury and sentenced to pay a fine of $500 and to serve 90 days in the County Jail for violation of the Medical Practice Act (Ill. Rev. Stat. 1949, ch. 91, sec. 2), upon an information consisting of five counts. Count I alleges that on March 6, 1940 in Chicago, Cook County, Illinois, defendant, having no license to practice the treatment of human ailments in any manner, "did then and there diagnosticate a supposed ailment of Charlotte Jones *** as pressure and muscular rigidity in the upper part of her neck;" count II, after repeating the formal allegations of Count I, charges that defendant treated the supposed ailment of pressure and muscular rigidity by applying pressure to the upper part of the patient's neck with his fingers and hands and by moving and jerking her head upwards; count III charges that defendant suggested and recommended the application of pressure to the upper part of the neck of the patient with his fingers and hands and moving and jerking her head upwards with intention of receiving a fee of $2.50 therefor; count IV alleges that defendant caused his name to appear and be printed on the bottom of each of three printed booklets intended to members of the public in the reception room of his office in Chicago - "HAY FEVER - WHAT WILL CHIROPRACTIC DO FOR IT?," "HEADACHES - WHAT WILL CHIROPRACTIC DO FOR IT?," "GOODBY THOUSIE - WHAT WILL CHIROPRACTIC DO FOR IT?" - in the

following manner: Chiropractic Health Bureau, A. Fred, D.C., Ph. C., and Margaret E., D.C., Ph. C., Kabana and Kabana, Third Dimension Spinographic (X-Ray) and Neurocalometer Analysis, Chicago Office, 188 W. Randolph Street, "Where The Sick Go to Get Well;" count IV also alleges that in printed circulars designated as Vol. 17, No. 3, and Vol. 19, No. 4 of The Chiropractic Educator, which were distributed in the same manner as the booklets heretofore referred to, defendant's name was printed as "Kabana and Kabana X-Ray and Neurocalometer Chiropractors," while under his photograph on the circulars appeared the letters "A. Fred - D. C., Ph. C;" and count IV further alleges that defendant caused his name to appear on a professional business card as follows: "A. Fred Kabana, D.C., Ph. C., Kabana and Kabana, Chiropractors;" and Count V, after repeating the formal allegations of counts I, II, III and IV, alleges that defendant maintained an office in Chicago for the examination of persons afflicted or supposed to be afflicted by any ailments.

Although defendant raises 20 separate points in his brief, most of which are not even argued, the principal ground urged for reversal, and the one to which he directed his attention upon oral argument, is that the court should have sustained his motion to quash the information because it did not inform the defendant of the nature of the accusation against him and failed to state a crime. People v. Brown, 336 Ill. 257, is cited and relied upon as supporting this contention. The gravamen of the argument is that the several counts do not set forth any specific act, and that the information does not meet the requirements set out in the leading case of People v. Brown. In that proceeding the information upon which Brown was tried and convicted

following manner: Chronographic [illegible] Ph. D., and Margaret E., T.C., Ph. D., [illegible] Third Dimension Spirometric (V-T-V) and Spirometer analysis, Chicago Office, 1923." Vandiver Brown, "Where the Sick Go to Get Well;" count IV also alleges that in printed circulars designated as Vol. II, No. 3, and Vol. I, No. 4 of The Chlorometric Laboratory, which were distributed in the same manner as the booklet hereinbefore referred to, defendant's name was printed as "Graham and [illegible] and Nonrecalcimeter Chlorometrics," while also the chlorometric on the circulars appears the letters "[illegible]." Count III and count IV further allege that defendant assumed the name to appear on a professional business card as follows: "A. Fred Graham, D.C., Ph. D., Adams and Tremont, Chiropractors;" and count V, after repeating the formal allegations of counts I, II, III and IV, alleges that defendant maintained an office in Ohio for the examination of persons afflicted or supposed to be afflicted by any ailments.

Although defendant raises 25 errors to claim in his brief, most of which are not even argued, the principal ground urged for reversal, and the one to which he directed his attention upon oral argument, is that the court should have sustained his motion to quash the information because it did not inform the defendant of the nature of the accusation against him and failed to state a crime. People v. Brown, 336 Ill. 327, is cited and relied upon as supporting this contention. The gravamen of the argument is that the several counts do not set forth any specific act, and that the information does not meet the requirements set out in the leading case of People v. Brown. In that proceeding the information upon which Brown was tried and convicted

charged that he "did willfully and unlawfully practice a system or method of treating human ailments without the use of drugs or medicine and without operative surgery, without a valid existing license so to do," and it was there contended that the information was not sufficiently specific to advise defendant of the nature and cause of the accusation or to state an offense punishable under the Medical Practice Act. The court pointed out that the purpose of section 9 of article 2 of the constitution, which provides that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him, was intended to guarantee the accused such specific designation as would enable him to prepare his defense and plead the judgment in bar of a subsequent prosecution for the same offense. The court stated that under the general rule it was sufficient to state the offense in the language of the statute, but said that rule applied only where the statute sufficiently defines the crime; and where the statute creating the offense does not describe the act or acts which compose it, they must be specifically averred in the indictment or information. The court then pointed out that section 2 of the Medical Practice statute does not state what act or acts may be regarded as constituting the practice of a system or method of treating human ailments and that such practice is not elsewhere in the act otherwise defined; therefore, an information charging, in the language of section 2 of the Medical Practice Act, that the defendant "did willfully and unlawfully practice a system or method of treating human ailments without the use of drugs or medicine and without operative surgery," etc., was insufficient where it does not specifically aver acts constituting

charged that he "did willfully and unlawfully practice a system or method of treating human ailments without the use of drugs or medicine and without operative surgery, without a valid existing license so to do." The court was there contended that the information was not sufficiently specific to advise defendant of the nature and cause of the accusation or to state an offense punishable under the medical practice act. The court pointed out that the purpose of section 2 of article 5 of the constitution, which provides that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him, was intended to guarantee the accused such specific information as would enable him to prepare his defense and plead the judgment in bar of a subsequent prosecution for the same offense. The court stated that under the general rule it was sufficient to state the offense in the language of the statute, but said that rule applied only where the statute specifically defines the crime; and where the statute creating the offense does not describe it or else describes it, they must be specifically averred in the indictment or information. The court then pointed out that section 2 of the medical practice act, which sets forth what act or acts may be regarded as constituting the practice of a system or method of treating human ailments and that the practice is not elsewhere in the act otherwise defined, therefore, an information charging, in the language of section 2 of the medical practice act, that the defendant "did willfully and unlawfully practice a system or method of treating human ailments without the use of drugs or medicine and without operative surgery," etc., was insufficient where it does not specify the exact acts constituting

a violation of the statute so as to advise the accused of the nature and cause of the accusation. That decision is not applicable to the case at bar because the instant information and each count thereof do set forth facts showing what acts were performed by defendant which constituted the offenses. The various counts specify the offenses with sufficient particularity to have put defendant on notice of what he was expected to meet on his trial, and were sufficiently specific in the description of the charge so that the defendant would be able to avail himself of his acquittal or conviction against a further prosecution for the same cause. In People v. Kabana, No. 42777, filed concurrently with this opinion, we held a similar information, consisting of seven counts, sufficiently specific to state an offense punishable under the act.

Among the numerous errors assigned, the only other ground seriously urged for reversal is that the court gave the following instructions over defendant's objections: "The Court instructs the jury that the term 'Medicine' is not limited to substances supposed to possess curative or remedial properties, but has also the meaning of the healing art, the science of preserving health and treating disease for the purpose of cure, whether such treatment involves the use of substances or not.

"The jury is instructed that to prescribe, within the meaning of the Medical Practice Act, is to write or give medical directions to indicate remedies. It is not necessary such a prescription should be in writing." With respect to these instructions, it is urged that the court undertook to define the practice

a violation of the statute so as to advise the defendant of the nature and cause of the accusation. The question is not applicable to the case at bar because the indictment information and each count thereof do set forth facts showing what acts were performed by defendant which constituted the offenses. The various counts specifically the offenses with sufficient particularity to have put defendant on notice of what he was expected to meet at his trial, and were sufficiently specific in the description of the charge so that the defendant could be able to avail himself of his acquittal or conviction against a further prosecution for the same cause. In People v. Sahms, No. 42777, filed concurrently with this opinion, we held a similar information, containing of seven counts, sufficiently specific to state an offense punishable under the act.

Among the numerous errors assigned, the only other ground seriously urged for reversal is that the court gave the following instructions over defendant's objections: "The Court instructs the jury that the term 'Medicine' is not limited to a substance or drug to possess curative or remedial properties, but in the meaning of the healing art, the science of preventing health and treating disease for the purpose of cure, whether such treatment involves the use of drugs or not.

"The jury is instructed that by practicing within the meaning of the Medical Practice Act, to write or give medical directions to little to cure disease. It is not necessary that a prescription should be in writing." With respect to the instructions, it is urged that the court wrongfully excluding the jury

of medicine, which is undefined in the statute, and defendant's counsel say this constitutes a reversible error. It is not suggested, however, that the instructions improperly defined the terms "prescribe" and "medicine" and no authorities are cited to support defendant's position. The Brown case upon which defendant relies does not relate to the definition of the words "medicine" or "prescriptions" but pertains to the terms used in the information, "the practice of medicine." The instructions given could not have prejudiced defendant's case.

Defendant produced no license which would have entitled him to practice the treatment of human ailments in any manner, nor did he deny the specific acts charged and proved. The evidence adduced by the state to prove violations of the statute amply supports the verdict. We are therefore of opinion that the judgment of the County court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan and Scanlan, JJ., concur.

of medicine, which is mentioned in the abstract, defendant's counsel may this constitutes a reversible error. It is not suggested, however, that the instructions improperly defined the terms "prescribe" and "medicine" and no authorities are cited to support defendant's position. The Brown case upon which defendant relies does not relate to the definition of the words "medicine" or "prescriptions" but pertains to the terms used in the information, "the practice of medicine." The instructions given could not have prejudiced defendant's case.

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JUDGMENT AFFIRMED.

Sullivan and Noonan, JJ., concur.

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RELACO ROSIN PRODUCTS CO., INC., Appellant,	)	
	)	APPEAL FROM MUNICIPAL
v.	)	
	)	COURT OF CHICAGO.
NATIONAL CASEIN COMPANY, a Corporation, and LOUIS T. COOK, Appellees.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action to recover for the sale of merchandise shipped to Southern Chemical Corporation and for expenses connected with the shipments. At the close of plaintiff's case the trial court, upon motion of defendants, directed the jury to return a verdict in their favor. Plaintiff appeals from a judgment entered upon the verdict.

Plaintiff strenuously contends that it made out a prima facie case against both defendants and that the trial court erred in directing the verdict.

Plaintiff is a Florida corporation with its principle place of business at Jacksonville, Florida. It processes and manufactures rosin, rosin size, and other derivatives of rosin. Defendant company has its principle place of business at Chicago. It makes casein, a milk product, which, like rosin size, is used in the manufacture of paper. Defendant Cook is president of defendant company. John O. Lewis is president of plaintiff company. On August 17, 1936, a contract was executed between plaintiff and defendant company, which provides that plaintiff has the facilities for manufacturing large quantities of rosin size, that defendant company was in a position to market that product, and it was mutually agreed that defendant company would purchase from plaintiff all of the rosin size for which it had a market, and plaintiff would sell the same to defendant company for a period of five years, subject to certain cancellation provisions. The contract also provides

RELACO ROSIN PRODUCTS CO., INC.,
Appellant,

v.

NATIONAL CASEIN COMPANY, a corporation, and LOUIS T. COOK,
Appellees.

APPEAL FROM DENISON
DISTRICT OF COLORADO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

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Plaintiff strenuously contends that it made out a prima facie case against both defendants and that the trial court erred in directing the verdict.

Plaintiff is a Florida corporation with its principle place of business at Jacksonville, Florida. It processes and manufactures rosin, rosin size, and other derivatives of rosin. Defendant company has its principle place of business at Chicago. It makes casein, a milk product, which, like rosin size, is used in the manufacture of paper. Defendant Cook is president of defendant company. John C. Lewis is president of plaintiff company. On August 17, 1936, a contract was executed between plaintiff and defendant company, which provides that plaintiff has the facilities for manufacturing large quantities of rosin size, that defendant company was in a position to market that product, and it was mutually agreed that defendant company would purchase from plaintiff all of the rosin size for which it had a market, and plaintiff would sell the same to defendant company for a period of five years, subject to certain cancellation provisions. The contract also provides

that the rosin size delivered should be invoiced by plaintiff to defendant company on a sight draft basis on the day of shipment, on a net cash basis f. o. b. Jacksonville, Florida. There is evidence tending to show that defendants desired to become, in effect, brokers for plaintiff's product, but that they did not wish by so doing to jeopardize their own business, which was similar to plaintiff's in that the products of both companies were used in the manufacture of paper; that defendant Cook felt that it would be harmful to defendants' business if it became known that defendant company was selling plaintiff's product in competition with firms which were selling defendant company's casein, and for that reason defendants desired to continue the said contract but to have the product sold to defendant corporation by plaintiff handled through a separate corporation, which should operate as an agency for them; that in order to accomplish their object, defendants intended to have the mills to whom defendants were selling plaintiff's rosin size believe that they were obtaining the rosin size from the producer and shipper, and that in furtherance of this purpose defendant Cook organized a new corporation, which was called the Southern Chemical Corporation, which name was intended to indicate that it was a southern company, because rosin was obtained from the south, and defendants arranged for shipments to be made by plaintiff in the name of Southern Chemical Corporation and for plaintiff to accept the return of empty drums at Jacksonville, because defendants thought that it might be detrimental to their purpose if it became known to the customers that Southern Chemical Corporation did not have a plant in the south; that that corporation did not have any plant anywhere but was merely a one man agency located at Mt. Vernon, New York, where the corporation was organized; that defendant Cook made E. Y. Burckhalter president of the Southern Chemical Corporation and sent him money to open an account for that corporation in a Mt. Vernon bank and

that the rosin size delivered should be invoiced by plaintiff to defendant company on a sight draft basis on the day of shipment, on a net cash basis f. o. b. Jacksonville, Florida. There is evidence tending to show that defendants desired to become, in effect, brokers for plaintiff's product, but that they did not wish by so doing to jeopardize their own business, which was similar to plaintiff's in that the products of both companies were used in the manufacture of paper; that defendant Cook felt that it would be harmful to defendants' business if it became known that defendant company was selling plaintiff's product in competition with firms which were selling defendant company's casein, and for that reason defendants desired to continue the said contract but to have the product sold to defendant corporation by plaintiff handled through a separate corporation, which should operate as an agency for them; that in order to accomplish their object, defendants intended to have the mills to whom defendants were selling plaintiff's rosin size believe that they were obtaining the rosin size from the producer and shipper, and that in furtherance of this purpose defendant Cook organized a new corporation, which was called the Southern Chemical Corporation, which name was intended to indicate that it was a southern co pany, because rosin was obtained from the south, and defendants arranged for shipments to be made by plaintiff in the name of Southern Chemical Corporation and for plaintiff to accept the return of empty drums at Jacksonville, because defendants thought that it might be detrimental to their purpose if it became known to the customers that Southern Chemical Corporation did not have a plant in the south; that that corporation did not have any plant anywhere but was merely a one man agency located at Mt. Vernon, New York, where the corporation was organized; that defendant Cook made E. Y. Burckhalter president of the Southern Chemical Corporation and sent him money to open an account for that corporation in a Mt. Vernon bank and

directed him to sign checks as president of the Southern Chemical Corporation; that plaintiff was ordered by defendants to make all shipments in the name of Southern Chemical Corporation of New York as consignor; that all of the goods so shipped by plaintiff were paid for save the shipments for which suit is brought. The evidence of plaintiff also tends to show that Burckhalter, on September 2, 1937, wrote to Cook, advising him that he had found a new rosin size connection whose product was cheaper than plaintiff's product and he suggested transferring their rosin size business to the other company when it would be ready for operation; that defendant company, by Cook, in a letter dated September 4, 1937, practically endorsed Burckhalter's plan of transferring the business to another company; that Burckhalter, on September 7, 1937, wrote Cook a letter in which he stated, inter alia: "However, I think it advisable to give him [the president of plaintiff corporation] the necessary support until we are able to transfer shipments to Goodyear Yellow Pine as we have contracts and commitments ahead which we must fill pending our transfer of shipments to Picayne, Miss. Confidentially, you need have no fear of Lewis carrying on a Size business without us. He hasn't got what it takes." The evidence also tends to show that Cook controlled the defendant company and the Southern Chemical Corporation. If it were necessary, we might state other facts and circumstances shown by the record that tend to support plaintiff's theory of fact. During the trial, which lasted over a week, plaintiff offered in evidence ninety-six exhibits and they were admitted by the trial court subject to a general objection by defendants that they did not tend to prove agency. As plaintiff was about to rest its case its counsel re-offered the exhibits in evidence and defendants made the same general objection to their admission. The trial court then ruled that the exhibits should not be admitted in evidence. After an

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examination of the exhibits, we are unable to understand upon what theory the trial court made this ruling, as the exhibits undoubtedly tend to support plaintiff's theory as to the relationship of the parties, and some of them very strongly tend to support plaintiff's case. Defendants attempt to justify the ruling of the court upon the claim that at the conclusion of the evidence plaintiff presented all of the exhibits en masse and that it was not the duty of the trial court to separate the competent exhibits from the incompetent, and that the trial court was therefore justified in rejecting all of them. This contention ignores the fact that during the trial the exhibits were offered separately or in small groups, and the trial court and defendants' counsel had ample opportunity to inspect them. The present position of defendants in reference to these exhibits does not appeal to our sense of justice. The exhibits should have been admitted and considered by the trial court in passing upon the motion to direct. In this connection it must be borne in mind that agency, like any other fact, may be shown by direct or circumstantial evidence. "The agency may be established and its nature and extent shown by parol evidence, whether it be direct or circumstantial. If there be doubt about the extent of the agency and the authority of the agent to bind the principal, reference may be had to the situations of the parties and the property, acts of the parties, and other circumstances germane to the question. In other cases it is held, where the evidence shows one acting for another under circumstances implying a knowledge on the part of the supposed principal of such acts, a prima facie case of agency is established. Doan v. Duncan, 17 Ill. 272; Rockford, Rock Island and St. Louis Railroad Co. v. Wilcox, 66 id. 417." (Mitchell v. McEwen Associates, 360 Ill. 278, 283, 284.)

The theory of plaintiff was that defendant company was liable under the contract of August 17, 1936, and that defendant

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The theory of plaintiff's case that [illegible] was liable under the contract of August 12, 1916, and the [illegible]

Cook was liable in the alternative; that defendants used the Southern Chemical Corporation as a dummy corporation and that that corporation and Burckhalter, its president, were agents of defendants, under the contract, in the matter of the transactions with plaintiff, including the shipments for which plaintiff sues. It was the theory of defendants "that the sales of merchandise for which this suit was brought were made by the plaintiff to the Southern Chemical Corporation and not to either of the defendants, and that the defendants did not have any connection, directly or indirectly, with such purchases by the Southern Chemical Corporation from the plaintiff;" that "the plaintiff failed to make out a prima facie case against the defendants so that a directed verdict was a necessary consequence."

"'A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489.' (Hunter v. Troup, 315 Ill. 293, 296, 297.)" (Mahan v. Richardson, 284 Ill. App. 493. See, also, Wolever, v. Curtiss Candy Co., 293 Ill. App. 586, 597.)

After a careful consideration of the evidence, viewed in the light of the foregoing principles of law, we have reached the conclusion that there is undoubtedly evidence sufficient to make out a prima facie case for plaintiff against defendants. In our judgment it would amount to a miscarriage of justice to permit

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[illegible] the light of the foregoing principles of law, we have [illegible] conclusion that there is undoubtedly evidence sufficient to make out a prima facie case for plaintiff [illegible]. In our judgment it would amount to a miscarriage of justice to permit

the instant judgment to stand.

Defendants have heretofore filed a motion in this court to transfer this appeal to the Supreme court on the ground that constitutional questions were raised in the trial court. We denied that motion. Defendants, in their brief, renew the motion. We adhere to our former ruling. Defendants also filed a motion to strike the report of proceedings from the record. We denied that motion. Defendants renew the motion in their brief. We adhere to our former ruling.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

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42740

321 I.A. 159

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

MRS. MARIE GRIFFIN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant was charged with a violation of par. 162, chap. 38, Ill. Rev. Stat. 1937, in that on November 2, 1942, at the City of Chicago, etc., she "was then and there unlawfully, wilfully and knowingly the keeper of a certain house of ill-fame or assignation, or place for the practice of prostitution." Defendant waived a jury and the trial court found her guilty of the offense and sentenced her to imprisonment in the County jail for a term of thirty days. Defendant sues out this writ of error.

Defendant contends that the competent evidence introduced against her does not prove her guilty of the charge; that the prosecution relied upon statements made by Peggy Jones and Melba DeVere while they were in the police station and under arrest; that these statements were inadmissible as against defendant; that no prostitution was proved by competent evidence to have taken place in her home; that the court in finding her guilty placed great reliance upon an exhibit which had not been admitted in evidence; that if the incompetent testimony be disregarded there remains no evidence upon which a conviction could be based, and that the prosecution failed to prove defendant guilty beyond a reasonable doubt.

On November 2, 1942, two police officers went to the home of defendant. One of them, James Hoey, went to the rear of the house and remained there while the other, William J. Cusack, went to the front of the house and rang

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On November 2, 1942, two police officers went to the home of defendant. One of them, James Hory, went to the rear of the house and remained there while the other, William J. Quasck, went to the front of the house and rang

the doorbell. Cusack testified that he was admitted by a colored maid and that Peggy Jones was standing behind the maid; that he saw defendant and she said to him, "So you are Johnnie's friend?" that he said, "Yes," and excused his appearance, saying that he had been bowling; that defendant asked him if he wanted to go upstairs and he said, "Yes;" that he then went upstairs with Peggy Jones to a room on the second floor; that the colored maid had two towels and she threw back the covers of the bed and left the room; that he then placed Peggy Jones under arrest; that as he was leaving the room he heard a radio playing in the next room, so he knocked on the door and Melba DeVere came to the door attired in a slip, whereupon he placed her under arrest; that then they all went downstairs, and he knocked on the door of defendant's apartment and when the colored maid opened the door he placed defendant under arrest; that he told her that he was a police officer and that his commanding officer was in the rear of the building; that defendant, at the time he saw her, was lying on a couch and he asked what was wrong with her and she said, "Arthritis;" that he asked her how long she had been living in the place and she said eighteen or twenty years; that defendant, her husband, Peggy Jones and Melba DeVere were taken to the police station, where Officer Hoey questioned Peggy Jones and Melba DeVere, both of whom signed written statements. The officers testified that defendant made no statement nor comment during the time Peggy Jones and Melba DeVere were questioned; that defendant just sat there; that the room in the police station where the two women were questioned "was about 15 feet by 15 or 20 feet." It is undisputed that defendant did not see the written statements signed by Peggy Jones and Melba DeVere and that they were not read to her. Officer Hoey testified

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that he asked defendant if she would sign a statement and that she said, "No," but upon cross-examination he stated that he never asked her any questions. Melba DeVere testified that she was working for Neisner Brothers Department Store and that she lived on the second floor of defendant's home; that she did not practice prostitution at any time and that she never gave defendant any money from prostitution; that at the time she was arrested in defendant's home she was lying down because she was not feeling well; that after she was taken to the police station she signed a statement presented to her by the officers; that the statements made in the statement are untrue; that she signed the statement because the police officer told her that "if I would sign a statement against this woman he would let me go home;" that at the time she was questioned by the police in the station defendant was sitting in the room about ten feet away from her; that the conversation she had with the police officers was held in low tones and that nobody standing ten feet away from where she and the officers were could hear what was being said; that at the time she was questioned and signed the statement she was in police custody, charged with an offense, and that the only reason she signed the statement was to get out of the police station. Defendant testified that she was a married woman and had lived at the place in question for twenty-two years; that she owns the property; that at the time she was arrested she had had arthritis for some time and was lying on the studio couch; that she cannot get around without a wheel chair; that on the night in question she did not say to Officer Cusack, "Do you want to go upstairs with her now?" that she did not maintain a house of prostitution on the premises; that she had apartments which she rented to roomers; that Peggy Jones lived in the third apartment with her husband; that she did not at any time receive money from Melba DeVere or any other person from the proceeds of any acts of prostitution;

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that at the time she was down at the police station she could not hear the conversation that the police officers had with Melba DeVere and Peggy Jones; that the police officers did not at any time tell her what Melba DeVere stated in her written statement and that she did not know what the statement contained; that upon the evening in question Miss Jones, who had an apartment on the third floor, came downstairs to answer the telephone and that after doing so she told defendant that a friend of hers was coming over and she was going to dinner with him; that when Officer Cusack entered the place she thought he was Miss Jones' friend. The testimony of Melba DeVere and defendant that tended to prove that defendant could not have heard the conversation that took place between Melba DeVere and the officers in the police station was not contradicted by the officers; nor did they contradict the statement of Melba DeVere that they told her that if she signed the statement against defendant they would let her go home. The prosecution offered the written statements of Peggy Jones and Melba DeVere as evidence against defendant. The trial court admitted the statement of Melba DeVere as evidence against defendant but ruled that the statement of Peggy Jones was inadmissible against defendant.

Defendant strenuously contends that the trial court erred in admitting in evidence against defendant the written statement made by Melba DeVere. The gist of the statement was that she lived at defendant's home; that she averaged from prostitution about fifty dollars a week and that she gave fifty per cent of it to defendant. Officer Cusack testified that the answers of Melba DeVere "were typewritten at about the same time they were made," by Officer Downs. Officer Downs was not called as a witness. It is undisputed that defendant did not read nor see the statement at the time that it was made. We hold that the written statement of

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Melba DeVere was not admissible against defendant and that its admission constituted reversible error under the facts of this case. See People v. Kozlowski, 368 Ill. 124, where the subject, evidence as to a defendant's failure to deny an accusation, is discussed at length. In answer to defendant's contention the People assume, without warrant under the record, that Melba DeVere made accusations against defendant in the presence and hearing of the latter and that defendant remained silent, and the People contend that under such a state of facts the written statement of Melba DeVere was admissible under the ruling in People v. Kessler, 333 Ill. 451. There the court said (pp. 457, 458):

"For a reversal of the judgment, the plaintiff in error makes the contention, among others, that the trial court erroneously admitted in evidence the testimony of the police officer that Smith at the Bridewell Hospital stated that the plaintiff in error had shot him, and that the plaintiff in error, who was present when the statement was made, did not deny the charge. This testimony was admitted on the theory that the failure of the plaintiff in error to deny the accusation was an admission of its truth. An admission may be implied from the conduct of a person charged with the commission of a crime who remains silent when another states in his hearing that he was concerned in its perpetration, where the statement is made under circumstances which allow him an opportunity to reply and under which persons similarly situated would ordinarily deny the imputation. (People v. Ross, 325 Ill. 417; People v. Nitti, 312 id. 73; People v. Wilson, 298 id. 257.) The plaintiff in error, it appears, heard and understood Smith's accusation. It was made by a person and under circumstances which naturally would call for a reply if untrue. Whether the charge was true was within the knowledge of the plaintiff

Molle Devere was not admissible against defendant and that its admission constituted reversible error under the facts of this case. See People v. Kozlowski, 368 Ill. 164, where the subject, evidence as to a defendant's failure to deny an accusation, is discussed at length. In answer to defendant's contention the People assume, without warrant under the record, that Molle Devere made accusations against defendant in the presence and hearing of the latter and that defendant remained silent, and the People contend that under such a state of facts the written statement of Molle Devere was admissible under the ruling in People v. Kessler, 333 Ill. 451. There the court said (pp. 457, 458):

"For a reversal of the judgment, the plaintiff in error makes the contention, among others, that the trial court erroneously admitted in evidence the testimony of the police officer that Smith at the Bridewell Hospital stated that the plaintiff in error had shot him, and that the plaintiff in error, who was present when the statement was made, did not deny the charge. This testimony was admitted on the theory that the failure of the plaintiff in error to deny the accusation was an admission of its truth. An admission may be implied from the conduct of a person charged with the commission of a crime who remains silent when another states in his hearing that he was concerned in the perpetration, where the statement is made under circumstances which allow him an opportunity to reply and under which persons similarly situated would ordinarily deny the imputation. (People v. Zona, 295 Ill. 417; People v. Mitchell, 312 id. 73; People v. Pilsen, 298 id. 577.) The plaintiff in error, it appears, heard and understood Smith's accusation. It was made by a person and under circumstances which naturally would call for a reply if untrue. Whether the charge was true was within the knowledge of the plaintiff

in error and he was at liberty to make a reply. The silence of the plaintiff in error was a circumstance having a tendency to show that he admitted the truth of the accusation. The probative force of that circumstance it was the jury's province to determine."

That case presents an entirely different situation from that presented in the instant proceeding, where the undisputed evidence shows that defendant did not hear the conversation between Melba DeVere and the police officer, and never read nor heard read the written statement that was introduced against her. Moreover, Melba DeVere repudiated the statement and testified as to why she signed it. The trial court, apparently influenced by her testimony, discharged her. The record presents an anomalous situation: The trial court during the hearing of this cause was at the same time hearing the charge against Melba DeVere of being an inmate of a house of ill-fame, and despite her alleged confession to the police, the trial court, on motion of her counsel, discharged her, but admitted her written confession as evidence against defendant. The record does not disclose the reason that prompted the trial court to admit the alleged confession of Melba DeVere as evidence against defendant and to refuse to admit the alleged confession of Peggy Jones as evidence against defendant. The written statement of Melba DeVere was, of course, admissible against her. Defendant also contends that the trial court was strongly influenced in his decision in the case by the fact that he had inspected a book that was offered in evidence by the prosecution but not admitted for the reason that defendant objected to the introduction of the book on the grounds that it was taken illegally, and counsel for defendant interposed a motion to suppress the offered evidence. The record shows that the

in error and he was at liberty to make a reply. The silence of the plaintiff in error was a circumstance having a tendency to show that he admitted the truth of the accusation. The probative force of that circumstance it was the jury's province to determine."

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court took the motion to suppress under advisement and that he did not pass upon the motion, nor did he admit the book in evidence. Upon the prosecution's direct case Officer Hoey testified but made no mention as to the book in question. After defendant had closed her case Officer Hoey was called as a rebuttal witness on behalf of the People and he then testified that when defendant got up from the couch in her home he saw the book in question under her pillow, that but part of it showed and he picked it up; that he then asked defendant if it was her book and she said, "Yes, please don't take it." Although the book was not admitted in evidence we have it before us. It contains numerous names and telephone numbers. Many of the names are those of women. When defendant was on the stand she was shown the book and she testified that it was not in her handwriting and that she never saw the book before. The trial court, at the conclusion of the evidence, discharged Melba DeVere and the husband of defendant. In deciding the case as to defendant he used the following language: "The Court: I want to say this about the case, there is no question in my mind, I see that book, - there is something wrong there, the thing has to be broken up. I don't know what I am going to do, she isn't running a pure and simple rooming house." From the foregoing statement, it appears that the contention of defendant that the court was influenced in his judgment by the book is a meritorious one. In People v. Reichert, 352 Ill. 358, 361, the court said:

"In the trial of criminal cases without a jury, the rule common in chancery proceedings that the chancellor is presumed to have considered only such evidence as is competent under the issues presented does not apply, but the court is bound by the rules of evidence whether the trial be before it or before a jury. Courts have no more right than a jury

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to convict the accused on incompetent evidence. * * * It is evident from the court's statement that the errors prejudiced plaintiff in error. As we have intimated, courts have no right, merely because there is a trial of a case before them without a jury, to override rules of evidence in the trial of the facts."

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED FOR A
NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

to convict the accused on incompetent evidence. * * * It is evident from the court's statement that the errors prejudiced plaintiff in error. As we have intimated, courts have no right, merely because there is a trial of a case before them without a jury, to overrule rules of evidence in the trial of the facts."

The judgment of the municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

42777

3211.A.1

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

A. FRED KABANA,
Plaintiff in Error.

ERROR TO COUNTY COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant was prosecuted for violation of the Medical Practice Act of the State of Illinois. The information contains seven counts. A jury returned a verdict finding defendant guilty as to counts 1, 2, 3, 4, 5 and 7, and not guilty as to count 6. The trial court overruled a motion for a new trial and fined defendant $100 upon each of counts 1, 2, 3, 4, 5 and 7, a total of $600. Defendant sued out a writ of error in the Supreme court on the assumption that constitutional questions were involved. That court held (383 Ill. 284) that there was no fairly debatable constitutional question involved, and transferred the cause to this court.

Sec. 24 of the Medicine and Surgery Act (Ill. Rev. Stat. 1943, ch. 91, par. 161) is as follows:

"If any person shall hold himself out to the public as being engaged in the diagnosis or treatment of ailments of human beings; or shall suggest, recommend or prescribe any form of treatment for the palliation, relief or cure of any physical or mental ailment of any person with the intention of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever; or shall diagnosticate or attempt to diagnosticate, operate upon, profess to heal, prescribe for, or otherwise treat any ailment, or supposed ailment, of another; or shall maintain an office for examination or treatment of persons afflicted, or alleged or supposed to be afflicted, by any ailment; or shall attach the title Doctor, Physician, Surgeon, M. D., or any other

word or abbreviation to his name, indicative that he is engaged in the treatment of human ailments as a business; and shall not then possess in full force and virtue a valid license issued by the authority of this State to practice the treatment of human ailments in any manner, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by confinement in the county jail not more than one year, or by both such fine and imprisonment, in the discretion of the court."

Each of the seven counts charges that defendant did not possess a license issued by the State of Illinois to practice the treatment of human ailments in any manner. The first count charges that defendant did "unlawfully diagnosticate or attempt to diagnosticate an ailment or supposed ailment of another, to-wit: did then and there diagnose a supposed ailment of Louis Janczak as shattered bones in the top of the spine adjoining the skull." Count 2 charges that defendant did "unlawfully diagnosticate or attempt to diagnosticate an ailment or supposed ailment of another, to-wit: did then and there diagnose a supposed ailment of Louis Janczak as a tilted skull and as the bone that is a joint of the top of his spine being over to one side." Count 3 charges that defendant did "unlawfully diagnosticate or attempt to diagnosticate an ailment or supposed ailment of another to-wit: did then and there diagnose a supposed ailment of Louis Janczak as a bone at the top of the spine being out of place." Count 4 charges that defendant did "unlawfully operate upon, profess to heal, prescribe for or otherwise treat an ailment or supposed ailment of another, to-wit: did then and there treat the supposed shattered bones in the top of the spine adjoining the skull of Louis Janczak and the tilted skull and the bone at the top of the spine being over to one side of Louis Janczak by twisting his head and neck with his fingers and hands." Count 5 charges

word or abbreviation to his name, [illegible] to be [illegible]
in the treatment of human ailments [illegible] will not
then possess in full force and virtue [illegible] by
the authority of this title to practice the treatment of human
ailments in any manner, or shall be guilty of [illegible] or
upon conviction thereof [illegible] not less
than one hundred dollars nor [illegible] dollars, or
by confinement in the county jail not more than [illegible], or by
both such fine and imprisonment, in the discretion of the court."

Each of the seven [illegible] that [illegible] not
possess a license issued by the State of Illinois to practice the
treatment of human ailments in any manner. [illegible] counts
charges that defendant did "unlawfully diagnosticate or attempt
to diagnosticate an ailment or ailments of a person [illegible],
to-wit: did then and there [illegible] of [illegible]
Tancock as shattered bones in the back of [illegible] the
skull." Count [illegible] charges that [illegible] unlawfully diagno-
sticate or attempt to diagnosticate an alleged ailment or ailments of [illegible],
to-wit: did
then and there diagnose a [illegible] ailment of [illegible] as
a slipped skull and as the bone that is [illegible] of the spine of the
spine being over to one side." Count [illegible] charges that defendant
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ailment or alleged ailments of a person to-wit: [illegible]
there diagnose a supposed ailment of [illegible] as a bone
at the top of the spine being out of [illegible]
that [illegible] unlawfully [illegible]
prescribe for or otherwise treat [illegible] ailment
of another, to-wit: did then and [illegible]
shattered bones in the back of the [illegible] or
bone tancock and the slipped skull and the [illegible]
the spine being over to one side of [illegible] by [illegible]
his head and neck with his fingers and hands." Count [illegible] charges

that defendant did "unlawfully suggest, recommend or prescribe a form of treatment for the palliation, relief or cure of a physical or mental ailment of a person with the intention of receiving therefor either directly or indirectly, a fee, gift or compensation, to-wit: did then and there suggest recommend and prescribe the twisting of the head and neck of Louis Janczak with the intention of receiving a fee of $5.00 in cash therefor." Defendant was acquitted as to the charge in count 6. Count 7 charges that defendant did "unlawfully maintain an office for examination or treatment of persons afflicted or alleged or supposed to be afflicted with any ailment, to-wit: did then and there maintain an office for the examination and treatment of persons afflicted and alleged and supposed to be afflicted with any ailment at 188 West Randolph Street, Chicago, Illinois, equipped with a Chiropractic table an X-ray machine and a Neurocolometer."

The People called Louis Janczak as a witness. He testified that he was an inspector for the Department of Registration and Education of the State of Illinois and was so employed about July 17, 1941; that upon that date he went into the building at 188 West Randolph street and in the lobby of that building he noticed in a display window a display of "Kabana & Kabana;" that the window "had various pamphlets and literature stating the treatment of chiropractic and pictures of different people in there," including one of Jack Dempsey, "and the heading was signed Kabana & Kabana * * * room 1405;" that in connection with the names of Kabana & Kabana were the words "Scientific chiropractor;" that he then went to the fourteenth floor and walked into the Kabana office; that the lady at the desk asked him what he wanted; that on the door of the office were the words "Kabana & Kabana;" that in the office were tables, chairs, pictures on the wall and rugs on the floor; that he did not see the defendant that day but that he saw him

that defendant did unlawfully suggest, recommend or prescribe a form of treatment for the publication, verbal or true of a physical or mental ailment of a person with the intention of receiving therefor either directly or indirectly, fee, gift or compensation, contrary to the form of statute, and prescribe the testing of the head of work of Orie Brooks with the intention of receiving a fee of $5.00, he, on therefore, Defendant was acquitted of the charge in count 3. Count 7 charges that defendant did "unlawfully maintain an office for examination or treatment of persons afflicted or alleged or supposed to be afflicted with any ailment, contrary to the form and there maintain an office for the examination and treatment of persons afflicted and alleged and supposed to be afflicted with any ailment at 138 West Randolph Street, Ville Jo, Illinois, equipped with a Diathermetic table an X-ray machine and a Neurocolometer."

The people called Louis Kurnick as a witness. He testified that he was an inspector for the department of Registration and Education of the state of Illinois and was so employed about July 17, 1941; that on that date he went into the building at 138 West Randolph Street, Ville Jo, in the lobby of that building he noticed in a glass window a display of "Kahans & Kahans;" that the window "has various pamphlets and literature stating the treatment of orthopaedic and children of different people in there," including one of "Jack Kenyon," "and the heading was signed 'Kahans' [illegible] Room 1409;" that in connection with the names of "Kahans" [illegible] were the words "Scientific Chiropractor;" [illegible] to the fourteenth floor and walked into the [illegible] office; that the lady at the desk asked him [illegible] on the door of the office were the words "Kahans" [illegible]; [illegible] office were tables, chairs, pictures on the wall and rugs on the floor; that he did not see the defendant that day but that he saw him

on July 21, 1941, at the same office. (Here the witness identified defendant, who was sitting in the courtroom.) The witness further testified that on the last date he was sitting in the reception room when the doctor came into the room; that the young lady at the desk told him to go into the dressing room and strip to the waist; that he undressed himself in the dressing room and sat there waiting for a little while; that "Dr. Kabana" called him in and looked at his x-ray pictures and told him that he was in bad shape, that he was a lucky dog that he came over to see him; that the doctor said, "You see the picture? Your spine is tilted from your skull. The bones are all shattered here. If you didn't come here until a little later the thing would have grown together, them bones, and I wouldn't be able to treat you, but now I can treat you;" that he sat there on a little stool and the doctor put the picture up to the light and ran a calometer down his spine and marked off his neck and spine, and then he said, "That is all. Go outside and the girl will give you another appointment;" that he dressed and paid the girl five dollars and she gave him a receipt for it; that the girl made an appointment for him and he returned on July 24, and undressed; that defendant called him into his private room and "went through the same form as we did on the 21st," and defendant "ran the calometer down my spine and marked off my spine and neck and said, 'I would like to spend about one hour with you, but I just haven't the time, but I will spend it with you next trip;'" that the doctor "called off some numbers to the nurse that was in the room," whose name was Kabanus; that she did some writing at a little desk in the room; that the doctor, also the young lady, told him to return on July 29. Here the witness testified that a neuro-calometer is "a meter that locates nerve pressure of the spine. It is a little instrument, a round instrument, with two little points coming out, and he runs it down the

on July 21, 1941, at the same office. (Here the witness identified defendant, who was sitting in the courtroom.) The witness further testified that on the first date he was sitting in the reception room when the doctor came into the room; that the young lady at the desk told him to go into the dressing room and strip to the waist; that he undressed himself in the dressing room and sat there waiting for a while; that "Madame" called him in and looked at his x-ray pictures and told him that he was in bad shape; that he was a lucky dog that he came over to see him; that the doctor said, "You see the picture? Your spine is tilted from your skull. The bones are all shattered here. If you didn't come here until a little later the thing would have grown together, then bones, and I wouldn't be able to treat you, but now I can treat you;" that he sat there on a little stool and the doctor put the picture up to the light and ran a colorotor down his spine and marked off his neck and spine, and then he said, "That is all. Go outside and the girl will give you another appointment;" that he dressed and paid the girl five dollars and she gave him a receipt for it; that the girl made an appointment for him and he returned on July 24, and witnessed; that defendant called him into his private room and went through the same form as we did on the first;" and defendant "ran the colorotor down my spine and marked off my spine and neck and said, 'I would like to spend about one hour with you, but I just haven't the time, but I will spend it with you next trip;'" that the doctor "called out some numbers to the nurse that was in the room," whose name was Kabana; that she did some writing at a little desk in the room; that the doctor, also the young lady, told him to return on July 29. Here the witness testified that a neuro-colorotor is "a motor that loosens nerve pressure on the spine. It is a little instrument, a round instrument, with two little points coming out, and he runs it down the

spine, and there is a dial on the righthand with a hand on it, and it has a dial on the hand;" that he paid three dollars on July 24 and received a receipt for the money; that on July 29 he returned to the defendant's office, "undressed, stripped to the waist; Kabana called me into his private room and ran the neuro-calometer down my spine and then he brought out the x-ray pictures, put them to a light and he started to show me various spots on the pictures about my shattered bone and spine up to the skull. He told me my skull was tilted a little, and he says, 'You see this white line running through here?' He says, 'That line indicates that this bone must be put into place to do away with that white line.' He says, 'Your treatment is a very serious treatment.' He says, 'It will take a period of time to treat you.' He says, 'I can treat you in a dozen or so treatments, and then you won't come back to me but you will have agreed to my plans of treating.' I asked him what were the plans of treating. He says, 'My plans of treating are six months of treatment, but,' he says, 'three times a week;'" that the witness asked defendant, "What will that cost me," to which defendant answered, "It will cost you $180, with a $45 down payment and the rest, $8 a week;" that the witness said, "Gee, that is quite a lot of money to raise, $45 right now; I don't think I can do it," to which defendant answered, "I can probably come in and take three treatments a week at $3 a treatment," to which the witness responded, "Well, I will agree to your plan;" that defendant said, "I will give you one dozen or so of treatments, maybe eighteen, and then you won't never return to me, you will be in the same shape as you were when you first come in;" to which the witness responded, "I will have to talk this over with my wife;" that he then went out and dressed and when he left the outer room he gave the girl two dollars and got a receipt for it. The witness further testified that upon the last visit the defendant showed him three x-rays, for which the

spine, and there [illegible] fold on the right hand side a mark on it, and it has a fold on the hand;' that he [illegible] dollars on July 24 and received a receipt for the [illegible] on July 29 he returned to the defendant's office, "unknown," stripped to the waist; [illegible] to [illegible] the [illegible] hand-[illegible] down my spine and then he brought out the x-ray pictures, put them to a light and [illegible] to show me various spots on the pictures about my [illegible] bone and spine up to the small. He told me my spinal [illegible] a little, and he says, 'You see this little line running through here;' he says, 'that line inside [illegible] there this bone must be put into place to do away with that white line.' He says, 'Your treatment is a very serious treatment.' He says, 'It will take a period of time to treat you.' He says, 'I can treat you in a dozen or so treatments, and then you won't come back to me but you will have agreed to my plans of treating.' I forget the what were the plans of treating. He says, 'My plans of treating are six months or three months,' he says, 'three times a week;' that the witness said defendant, "what will that cost me," to which defendant answered, "It will cost you [illegible]. [illegible] payment and the rest." [illegible] that [illegible] asked, "Yes, that is quite a lot of money to raise, why right now I don't think I can do it," to which defendant answered, [illegible] come in and take three treatments a week at [illegible]," to which the witness responded, "Well, I will agree to your plan;" that defendant said, "I will give you one treatment or so of treatments, maybe eighteen, and then you won't never return to me, you will be in the same shape as you are [illegible] come in;" to which the witness responded, "I will come to this over with my wife;" that he then came out [illegible] and when he left the office room he gave the girl two dollars and got a receipt for it. The witness further testified that upon the last visit the defendant showed his three x-rays, for which the

witness paid fifteen dollars; that a young lady by the name of Kabanus took the x-ray pictures on July 18; that the witness saw the defendant again at his office on August 8; that the doctor asked him why he stayed away so long and called him into his private office, where the witness said, "Doc, it was pretty hard for me to meet the $45 down payment. I would like to get the treatment but I just can't make the down payment," to which defendant answered, "We can come to some other arrangement;" that the witness told the defendant that he was going to see somebody else on North avenue, to which defendant answered, "Why do you want to go over to see somebody else, don't you know I am the best engineer in this business?" that the witness laid five dollars on defendant's desk, but as defendant did not pick it up, the witness did; that he then went to the dressing room and stripped to the waist and went into the private treating room and defendant ran the neuro-calometer down his spine and he showed the witness the x-rays "with my spine and skull shattered and he put me on a * * * table which was tilted;" that while he was on the table defendant "pressed my body and he lowered it down and he told to lay on my lefthand side. I laid on the lefthand side and he manipulated - - * * * I laid on the lefthand side. He pressed with his hands on the righthand side of my neck and then he told me to lay over on my righthand side and he pressed with his hands along my spine here and the neck, and then he gave my head a twist and it snapped, and he says, 'That is all.' And I walked out and he told me to lay down on a little couch there for a couple of minutes. I laid there for a few minutes and then dressed up and walked outside and paid the girl $5," for which he got a receipt. The witness then testified that in the doctor's private office "there is a table, a tilted table, standing up this way at the desk and in there are little filing

[illegible] "Like a [illegible]
Kahanna took the [illegible] witness on [illegible]
saw the defendant [illegible]
doctor asked him [illegible]
into his private [illegible]
pretty hard for me to [illegible]
to get the treatment but I just can't [illegible]
to which defendant [illegible]
ment;" that the witness told the defendant that [illegible]
see somebody else on Ninth avenue, to which defendant answered,
"Why do you want to go over to see somebody else, don't you
know I am the best [illegible] in this business?" but the witness
laid five dollars on defendant's desk, but defendant did not
pick it up, the witness did; then he went to the waiting
room and ushered to the [illegible] into the private treating
room and defendant [illegible] down his [illegible] and he
showed the witness [illegible] "Pick up [illegible] and stand in front
and he put me on a [illegible] table [illegible] while he
was on the table defendant pressed [illegible] in [illegible] it down
and he told to lay on my [illegible] side. I laid on the left hand
side and he [illegible] I lie on the [illegible] side, he
pressed with his [illegible] on the [illegible] side of [illegible]
he told me to lay over on [illegible]
his hands along my spine [illegible]
been a toilet and it [illegible]
walked out and he told me to [illegible]
for a couple of minutes. I laid there for [illegible]
then dressed up and walked outside and [illegible]
which he got a receipt. The witness then [illegible]
doctor's private office. There is a table, [illegible]
ing up this way at the desk and in there are [illegible]

cabinets from the little ones on the desk. There is a little frame with glass in front of it where Kabana has his x-rays - * * * where Kabana put his x-rays that let the light on;" that he saw him do that. The witness further testified that on the day that the x-rays were taken he was given "booklets and pamphlets;" that there were lots of other booklets and pamphlets of the same kind in the office. Upon cross-examination the witness testified, inter alia, that defendant told him on the 21st or 29th of July that he had some shattered bones between the spine and his neck; between his neck and his skull; that when he first went to see the defendant he told the latter that he had a pain along his shoulder and neck; that as a matter of fact he did not have a pain there; that on July 29 the defendant told him that he was going to straighten the bones out. The witness further testified that the purpose of his visits to the doctor was to get information that might be used in a criminal case against the defendant. The witness was subjected to a long cross-examination, the evident purpose of which was to break down his testimony, but we do not deem it necessary to state at length the cross-examination for the reason that defendant did not take the stand, nor did he call any witness to contradict or rebut the testimony of Janczak, nor did defendant offer a license showing that he was authorized to treat human ailments in any way, although the burden of proving that he had a proper license rested upon defendant. (People v. Frankowsky, 371 Ill. 493, 495; People v. Paderewski, 373 Ill. 197, 199.) Upon redirect the witness testified that upon the cover of certain pamphlets that he obtained in the office of defendant appear the words, "Kabana & Kabana, Scientific Chiropractors." He further testified that he did not upon any occasion tell defendant that he had shattered bones at the top of his spine, nor did he tell him that he had a tilted skull, nor did he tell him that the top of his spine was out of place. At the

cabinets from the little ones in the back. There is a little frame with glass in front of it where [illegible] his x-rays - * * * where Adams put his x-rays that he saw the light on; that he saw him do that. The witness further testified that on the day that the x-rays were taken he saw in "booklets and pamphlets;" that there were lots of other booklets and pamphlets of the same kind in the office. Upon cross-examination the witness testified, inter alia, that he had told him on the 21st or 20th of July that he had some sharp pain bones between the spine and his neck; between his neck and his shoulder; that when he first went to see the defendant he told the latter that he had a pain along his shoulder and neck; that as a matter of fact he did have a pain there; that on July 29 the defendant told him that he was going to straighten the bones out. The witness further testified that the purpose of his visits to the doctor was to get information that might be used in a criminal case against the defendant. The witness was subjected to a long cross-examination, the evident purpose of which was to break down his testimony, but we do not deem it necessary to state it. Length the cross-examination for the reason that defendant did not take the stand, nor did he call any witness to contradict or refute the testimony of Jameson, nor did defendant offer a license showing that he was authorized to treat human skin in any way, although the burden of proving that he had a proper license rested upon defendant. (People v. [illegible], 371 Ill. 490, 495; People v. [illegible], [illegible] Ill. 1941, 1944.) Upon redirect the witness testified that upon the cover of certain pamphlets that he obtained in the office of defendant appear the words, "Adams & Adams, Colorado Springs." He further testified that he did not upon any occasion tell defendant that he had shattered bones at the top of his spine, nor did he tell him that he had a tilted sacrum, nor did he

conclusion of the examination of the witness the four receipts were offered in evidence.

We have before us a case where the evidence shows clearly that defendant, without a license to practice chiropractics, held himself out as a chiropractor and administered certain treatments to the witness Janczak. It is due to the honest, qualified and licensed chiropractors to say that defendant was not only practicing without a license but that his treatment of Janczak shows that he was a charlatan, and not an honest follower of the chiropractic system.

That defendant practically relied upon the constitutional questions urged by him to reverse the judgment of the County court is indicated by his brief. Aside from the constitutional points urged a few other points are raised but they are very briefly and superficially argued. From a reading of the abstract it would appear that the trial court gave only two instructions to the jury and refused one. The record, however, discloses that the trial court gave to the jury twenty-nine instructions, some of them lengthy. At the instance of defendant the trial court gave a special instruction as to each count. After reading all of the given instructions we are of the opinion that the People, not the defendant, might justly complain of the instructions as a whole. Defendant complains that the court erred in giving, at the instance of the People, instructions number 16 and number 21, and in support of his contention cites People v. Brown, 336 Ill. 257. In the Brown case the Supreme court held that an information which charged that the defendant "did willfully and unlawfully practice a system or method of treating human ailments without the use of drugs or medicine and without operative surgery, without a valid existing license so to do," was not sufficiently specific to advise the defendant of the nature and cause of the accusation or to state an offense punishable under the Act. The

[illegible]

information in the present proceeding is not subject to that criticism, as each of the counts specifically avers the overt act constituting the violation of the statute. There is no merit in the instant contention.

Defendant contends that the trial court erred in refusing to give the following instruction offered by defendant: "The Court instructs the jury that the laws of the State of Illinois do not define or specify what constitutes the practice of medicine or the treatment of human ailments." There is no charge in the instant information that defendant practiced medicine. As to the concluding part of the instruction, viz., "or the treatment of human ailments," as we have heretofore stated, each of the special instructions given to the jury at the instance of defendant told the jury what specific act the jury must find that the defendant did before they could find him guilty. To illustrate: The special instruction as to count 1 reads as follows: "You are instructed that before you can find the defendant guilty under Count 1 of the said Information you must believe beyond a reasonable doubt and to a moral certainty that the defendant did diagnose a supposed ailment of Louis Janczak as shattered bones in the top of the spine adjoining the skull. If the People fail to prove this allegation and each element thereof beyond a reasonable doubt and to a moral certainty it is your duty to find the defendant not guilty, as to Count 1." There is no merit in the instant contention.

But a few lines are given to the argument in support of defendant's contention that the verdict of the jury is contrary to the evidence. Defendant states: "* * * according to the evidence the complaining witness had no ailment. Therefore the verdict of the jury is against the weight of the evidence." In view of the evidence and the law that bears upon it (sec. 24), it is difficult to believe that this argument is seriously made. The uncontradicted facts demonstrate that the instant contention

information in the present [illegible]
antidote, as each of the counts specifically [illegible]
not constituting the violation of the [illegible]
merit in the instant [illegible].

Defendants cont[illegible] [illegible]
fusing to give the following instructions [illegible]:
"The Court instructs the jury that the [illegible] of
Illinois do not define or specify the [illegible]
of medicine or the treatment of [illegible]. There is no
change in the instant information [illegible]
medicine. As to the [illegible] of the [illegible], viz.,
"or the treatment of [illegible]
states, each of the special [illegible] jury of
the innocence or defendant [illegible]
jury must find that the [illegible]
his guilty. To this [illegible] I [illegible] to
count I reads as follows: "[illegible] that you can
can find the defendant guilty [illegible] I [illegible] [illegible]-
struction you must believe beyond [illegible] to a moral
certainty that the [illegible] or
bona fide research [illegible]
the sick. If the jury fail to prove [illegible]
element thereof [illegible] I [illegible]
it is your duty to find the defendant not guilty, [illegible] I.
There is no merit in the instant contention.

Just a few lines [illegible] of
defendant's contention that [illegible]
to the evidence, [illegible]
dence the [illegible]
verdict of the jury is not the [illegible]
view of the evidence and [illegible]
it is difficult to believe that [illegible]
The unsontradicted facts demonstrate that the instant contention

is without the slightest merit.

In conclusion we feel impelled to quote the following from People v. Shaver, 367 Ill. 339, 346:

"The evidence shows defendant's guilt beyond any reasonable doubt. The health and lives of the people are of the utmost importance. The statute was enacted to safeguard them and to prevent their being jeopardized by the very things this record discloses. There are no mitigating circumstances shown, and a smaller penalty would but tend to condone a grave offense. The punishment is not excessive."

In the instant case the trial court was more than lenient in merely fining defendant.

The judgment of the County court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

is [illegible] the sufficient [illegible].

In conclusion [illegible] the following from Hoagly, Lawyer, [illegible]:

"The [illegible] on any reason[illegible] doubt. The [illegible] of the [illegible] the [illegible] importance. The [illegible] to [illegible] them and to prevent [illegible] the very [illegible] this a good citizen. There are no [illegible] aforesaid, as a [illegible] upon [illegible] to [illegible] offense. The punishment is not [illegible]."

In the instant case the trial court [illegible] judgment in merely finding [illegible].

The judgment of the county court of [illegible] county is affirmed.

[illegible]

Friend, P. J., and Sullivan, J., concur.

GEN. NO. 9891 AGENDA NO. 2

321 I.A. 161

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1943

LAVERNE WALL, as Administrator of the Estate of Donald L. Wall, deceased, Appellant, v. CHARLES E. GREENE and JEANETTE GREENE, Appellees.	APPEAL FROM CIRCUIT COURT OF IROQUOIS COUNTY.

DOVE, J.:

Appellant brought an action against appellees in the circuit court of Iroquois County to recover damages for the benefit of the next of kin of Donald L. Wall, deceased, on account of his death from injuries sustained in consequence of being struck by an automobile driven by appellee Jeanette Greene. Appellee Charles E. Greene, her husband, sat with her on the front seat, and her parents and her sister occupied the rear seat. The accident took place at about 4:30 o'clock P. M., on June 8, 1941, at a highway culvert on U. S. Route No. 52, about one mile west of its intersection with State Highway No. 1. The decedent, a minor, five years of age, with his mother and three other persons,

IN THE

APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT.

OCTOBER TERM, A. D. 1943

LAVERNE WALL, as Administrator of the Estate of Donald L. Wall, deceased,	
Appellant	
v.	
CHARLES E. GREENE and JEANETTE GREENE,	
Appellees.	

[illegible]

CIRCUIT COURT OF

[illegible] COUNTY.

DOVE, J.:

Appellant brought an action against appellees in the circuit court of Ingoglo County to recover damages for the benefit of the next of kin of Donald L. Wall, deceased, on account of his death from injuries sustained in consequence of being struck by an automobile driven by a police lieutenant [illegible]. [illegible] Charles E. [illegible] husband, but with her in the front seat, and [illegible] occupied the rear seat. The accident took place [illegible] P. M., on June 8, 1941, [illegible] one mile east of its intersection with [illegible] ent, a minor, five years of age, with his father [illegible]

were standing on the culvert, close to the north wall thereof, off the north edge of the paved roadway. As the Greene car approached, going west, another car going in the same direction sounded its horn and passed the Greene car, and as soon as the first car passed the group on the culvert, the decedent jerked loose from his mother, who was holding his hand, darted out onto the roadway into the path of the Greene car and started back, but was struck by it, and died a few minutes later from his injuries.

A jury trial resulted in a verdict and a judgment thereon in favor of appellees. On February 1, 1943, we dismissed an appeal from the judgment because of a failure to file the record in the court within sixty days from the filing of the notice of appeal in the circuit court. Appellant's subsequent petition for leave to appeal, conformably to the provisions of section 76 of the Civil Practice act, (Ill. Rev. Stat. 1941, chap. 110, par. 200), was allowed, and the cause is thereby before us for consideration.

The amended complaint consists of one general negligence count, alleging that Charles E. Greene was the owner and operator of the automobile; that it was being driven by Jeanette Greene at his request and with his consent; and that he was in a position to maintain supervision and control of the operation of the same; that for 800 yards east of the culvert appellees had an unobstructed view of the highway, and of the decedent and other children standing within the culvert wall off the north edge of the paved surface of the highway; excessive speed of the automobile, at more than forty miles an hour; failure to diminish the speed; and failure to sound a horn or by other means give warning of the approach of the automobile, in violation of sections 146 and 212, respectively, of chapter 95½ (the Motor Vehicles act) of the statutes of this State.

were standing on the culvert, close to the north [illegible] of the north edge of the paved roadway. As the Greene car approached, going west, another car going in the same direction sounded its horn and passed the Greene car, and as soon as the first car passed the group on the culvert, the deceased jerked loose from his mother, who was holding his hand, darted out into the roadway into the path of the Greene car and struck back, but was struck by it, and died a few minutes later from his injuries.

A jury trial resulted in a verdict and judgment thereon in favor of appellees. On February 1, 1949, we dismissed an appeal from the judgment because of a failure to file the record in the court within sixty days from the filing of the notice of appeal in the circuit court. Appellant's subsequent petition for leave to appeal, conformably to the provisions of section 76 of the Civil Practice act, (Ill. Rev. Stat. 1951, chap. 110, par. 101), was allowed, and the cause is thereby before us for consideration.

The amended complaint consists of one count, negligence count, alleging that Charles E. Greene was the owner and operator of the automobile; that it was being driven by Jeanette Greene at the request and with his consent; and that he was in a position to maintain supervision and control of the operation of the car; that for 300 yards east of the culvert appellees had an unobstructed view of the highway, and of the deceased and other children standing within the culvert well off the north edge of the paved surface of the highway; also the speed of the automobile, at more than forty miles an hour; failure to diminish the speed; and a failure to sound a horn or by other means give warning of the approach of the automobile, in violation of sections 145 and 212, respectively, of chapter 95½ (the motor vehicle act) of the statutes of this state.

Appellant claimsthat under section 35 (par. 159) of the Civil Practice act, supra, the trial court erred in denying his motion, made before the commencement of the trial, for judgment in his favor, because of the want of a verified answer to the verified amended complaint. The record shows that on March 28, 1942, appellees were ruled to plead to the verified amended complaint by April 7, 1942. On April 4, 1942, Jeanette Greene filed an unverified answer; and on the same day Charles E. Greene filed a motion to dismiss as to him. His motion was denied on April 9, 1942, and on April 27, 1942, an order was entered permitting him to adopt, as his answer, the answer of Jeanette Greene, and reciting that he did so. On June 3, 1942, appellant filed his above mentioned motion for judgment, which was denied, and on the same day appellees were granted leave to attach verifications to the answer, and to amend the same by interlineation. They filed a joint verification of the amended answer the next day. Appellants' contention that each of them was in default when the motion for judgment was made cannot be sustained. The motion of Charles E. Greene and the unverified answer of Jeanette Greene were each filed within the time to plead limited by the rule. So far as the abstract shows, no subsequent rule was entered to further plead or answer within any certain time. The permitted verification of the answer was obviously an amendment thereto and was filed in due time. Amendments to pleadings are expressly authorized by section 46 (par. 170) of the Civil Practice act, supra, and by the terms of section 4, (par. 128), the act is to be liberally construed. So, too, the claim that orally adopting the answer of a co-defendant is not a compliance with the statutory requirement for written pleadings, is equally unsound. When the written answer of Jeanette Greene was adopted of record

[illegible] appellant's claims [illegible] and [illegible] (par. 189) of the Civil Practice Act. [illegible] in denying his motion, made before the commencement [illegible] for judgment in his favor, because of the [illegible] to the verified amended complaint. The [illegible] 28, 1942, appellees were ruled to plead to the verified amended complaint by April 7, 1942. On April 6, 1942, [illegible] filed an unverified answer; and on the same day Charles E. Greene filed a motion to dismiss as to him. His motion was denied on April 6, 1942, and on April 27, 1942, an order was entered permitting him to amend, as his answer, the answer of Jennette Greene, and requiring that he did so. On June 3, 1942, appellant filed his more restricted motion for judgment, which was denied, and on the same day appellees were granted leave to attach verifications to the answer, and to amend the same by interlineation. They filed a joint verification of the amended answer the next day. Appellants' contention that each of them was in default when the motion for judgment was made cannot be sustained. The motion of Charles E. Greene and the unverified answer of Jennette Greene were each filed within the time to plead limited by the rule. So far as the abstract shows, no subsequent rule was issued to compel them to plead or answer within any certain time. The verified verification to the answer was obviously an amendment thereto and was filed in time. Amendments to pleadings are expressly authorized by section 46 (par. 170) of the Civil Practice Act, supra, and by the terms of section 4, (par. 128), the act is to be liberally construed. We, therefore, [illegible] that orally adopting the answer of a co-defendant is not inconsistent with the statutory requirement for written [illegible], and is [illegible] sound. When the written answer of Jennette Greene [illegible]

by Charles E. Greene, it became his written pleading, as much so as it was her's. When verified by them, the amended answer conformed to the requirements of section 35 of the Civil Practice act. Nor is there any force in the argument that the verification lost its effectiveness through the fact that the amendment by interlineation was thereafter made without being sworn to. The amendment was an interlineation in the answer admitting the death of plaintiff's intestate, as charged in paragraph 3 of the amended complaint.

The claim that the verdict is against the manifest weight of the evidence necessitates an examination of the testimony. Route 52 runs directly east and west at the place of the accident, and is level and without any curve for a long distance in each direction. The roadway is paved eighteen feet wide. The north and south walls of the culvert are each three feet from the edge of the pavement, and are two feet and ten inches high and sixteen feet long. The space between each wall and the edge of the pavement is also paved.

At the time of the accident the sky was clear and the sun was shining brightly. The Greene car was traveling west on Route 52, enroute to the home of appellees in Aurora from Terre Haute, Indiana. The testimony shows the speed of the car was approximately 45 miles per hour as it approached the culvert and at the time of the accident. Another car, also going west, and traveling at a high rate of speed, overtook and passed the Greene car a short distance east of the culvert, and sounded its horn as it passed. Charles E. Greene estimated the point of passing as somewhere around 400 feet to 500 feet east of the culvert. His wife and her father estimated the distance at 300 feet, and Charles Hufford, apparently a disinterested witness who was standing about 100 yards east of the culvert, north of the fence on the north side of the highway, placed the point of passing at about 50 yards, or a little more, east of the culvert. The car which passed the Greene

by Charles E. Greene, it became his writ [illegible], as it was her's. When verified by them, the [illegible] formed to the requirements of section 55 of the [illegible] act. Nor is there any force in the argument that the verification lost its effectiveness through the fact that the amendment [illegible] tion was thereafter made without being sworn to. The amendment was an interlineation in the answer admitting the death of plaintiff's intestate, as charged in paragraph 3 of the amended complaint.

The claim that the verdict is against the preponderant weight of the evidence necessitates an examination of the testimony. Route 52 runs directly east and west at the place of the accident, and is level and without any curve for a long distance in each direction. The roadway is paved eighteen feet wide. The north and south walls of the culvert are each three feet from the edge of the pavement, and are two feet and ten inches high and sixteen feet long. The space between each wall and the edge of the pavement is also paved.

At the time of the accident the sky was clear and the sun was shining brightly. The Greene car was travelling west on Route 52, enroute to the home of [illegible] in Aurora from Ferndale, [illegible]. The testimony shows the speed of the car was approximately 45 miles per hour as it approached the culvert and at the time of the accident. Another car, also going west, and travelling at a high rate of speed, overtook and passed the Greene car a short distance east of the culvert and sounded its horn as it passed. Charles E. Greene entertained the point of passing as somewhere around 400 feet to 500 feet east of the culvert. His wife and her father estimated the distance [illegible] and Charles Hartford, apparently a disinterested witness, [illegible] ing about 100 yards east of the culvert, north of the [illegible] north side of the highway, place the [illegible] or a little more, east of the culvert. [illegible]

car was from 75 to 150 feet ahead of it when the accident occurred. Anna Marie Kline, who was standing on the culvert, testified that the Greene car came very close behind the passing car.

The decedent lived with his parents on the farm adjoining the south side of the highway. South of the culvert is a hog lot, adjoining the barn yard west of it, and the dwelling house is still farther west. On the afternoon of the accident, decedent's mother, Mary Wall, with two neighbor girls, Anna Marie Kline and Mildred Kline, aged eighteen years and seventeen years, respectively, and Ronald Kline, a younger brother of the two sisters, had been picking wild berries some distance east of the culvert. As they were returning home, Ronald Kline went down under the culvert, and the other three mentioned were standing on the culvert close to the north wall. The decedent, his brother Ronald, eight years old, and a cousin younger than Donald, were playing in the hog lot. The two brothers came through the fence and ran across the highway to where their mother and the girls were standing. Mrs. Wall told them to go back and play in the barn lot or hog lot and they started back. Just at this time the horn of the car passing the Greene car sounded. Mrs. Wall and the two girls heard it. She took hold of Donald's hand, and told him to wait until the "cars" got by. She testified that as soon as the first car passed, Donald slipped his hand out of hers, that she did not have a real hard grip and was just holding his hand; that he jerked his hand out and darted out onto the road, looked down it and started back, and the Greene car hit him. The testimony of the other witnesses for appellant is substantially the same as hers. The decedent suffered a fracture of the skull from which he died. Appellees concede that the Greene car did not sound its horn at any time or decrease its speed before striking the decedent. Mr. Greene got out of the car about 50 to 60 feet west of the culvert, and it came to a full stop 20 to 30 feet beyond that point. Mrs. Wall asked him to take the child to the hospital at Watseka, about ten miles away, but he told her

he thought the boy was bleeding too badly, and carried him to the house, and stayed there until after the undertaker came.

Jeanette Greene testified that she first saw the people standing on the culvert when the car was approximately 100 feet to the east, and that she did not see the decedent until after the accident. Mr. Greene testified that he first saw the people standing there when th car was from 150 to 200 feet away, and did not see the decedent until he darted out onto the road, and that at that time the boy was about 20 to 30 feet in front of the car; that he immediately grapped the steering wheel, called to his wife to look out, that she was going to hit a youngster, and steered the car to the left in an effort to avoid hitting the child, but failed to miss him by about four inches; that Mrs. Greene was holding the car on a straight course, which was overcome to the extent mentioned by his effort to steer it to the left. Mrs. Greene applied the brakes when the car swerved. At all times prior to that it was in its proper lane on the pavement. The cowl ventilator on the hood of the car was open. It appears that Mr. Greene testified at the coroner's inquest that he thought it might have somewhat obstructed his view. He testified on the trial that it does not obstruct vision. Common knowledge of the size and location of such instrumentalities indicates that his testimony on the trial was true, particularly as to objects on either side of the pavement. Mrs. Greene testified that the car had been bought for her; that she is of short stature, and that the front seat had been adjusted forward and raised; that the hood and vent did not impair her forward vision at all; that there was a certain space over the hood where she could not see, but that there was no area in front of the car where she could not see the pavement and the road straight ahead on both sides.

The question of negligence of the defendant and contributory negligence of the plaintiff enters into all such cases as this. It is well settled that a child of the age of Donald L. Wall, five years, is incapable of such conduct as will constitute contributory negligence.

he thought the boy was bleeding too badly, and carried him to the house, and stayed there until after the ambulance came.

Jeanette Greene testified that she first saw the people standing on the curbstone when the car was approximately 100 feet to the east, and that she did not see the decedent until after the accident. Mr. Greene testified that he first saw the people standing there when the car was from 150 to 200 feet away, and did not see the decedent until he darted out onto the road, and that at that time the boy was about 20 to 30 feet in front of the car; that he immediately grabbed the steering wheel, called to his wife to look out, that she was going to hit a younger boy, and steered the car to the left in an effort to avoid hitting the child, but failed to miss him by about four inches; that Mrs. Greene was holding the car on a straight course, which was overcome to the extent mentioned by his effort to steer it to the left. Mrs. Greene applied the brakes when the car swerved. At all times prior to that it was in its proper lane on the pavement. The cowl ventilator on the hood of the car was open. It appears that Mr. Greene testified at the coroner's inquest that he thought it might have somewhat obstructed his view. He testified on the trial that it does not materially obstruct his view. Common knowledge of the size and location of such instruments of this indicates that his testimony on the trial was true, particularly as to objects on either side of the pavement. Mrs. Greene testified that the car had been bought for her; that she is of short stature, and that the front seat had been adjusted for her and nothing; that the hood and vent did not impair her forward vision; that there is a certain space over the hood where one can not see, but that there was no area in front of the car where she could not see the pavement and the road straight ahead on both sides.

The question of negligence of the defendant and contributory negligence of the plaintiff entere into all such cases. It is well settled that a child of the age of Donald L. Hill, five years, is incapable of such conduct as will constitute contributory negligence.

(Maskaliunas v. Chicago and Western Indiana Railroad Co., 318 Ill. 142, 149.) It is equally well settled that the burden is on the parents of such a minor to acquit themselves of contributory negligence, as well as to establish negligence on the part of the defendants, and that contributory negligence on the part of a parent is a bar to the action. A long line of cases to that effect is found in Ohnesorge v. Chicago City Railway Co., 259 Ill. 424, 434.)

There is no testimony in the record which shows that Donald was visible to either of appellees at a point more than 20 or 30 feet away. According to the witness Hufford, Mrs. Wall and the two girls were standing against the culvert wall, leaning over and looking down, and Donald was standing beside his mother. The fact that Mr. Hufford, while standing north of the fence along the north side of the highway, 100 yards east of the culvert, saw Donald, saw his mother take his hand, and saw him jerk away and dart out onto the road, does not necessarily mean that either of appellees, approaching in almost the same line as the line of people on the culvert, could have seen Donald from the automobile at any greater distance that Mr. Greene did see him. Appellant argues that they should have seen what Hufford saw. If that be true, they would have seen Donald's mother take him by the hand, and would have had no occasion to anticipate that he would jerk loose and dart out onto the road.

We are not impressed with the argument that Mr. Greene was shown to be guilty of negligence by his testimony that after he saw the boy in peril he could have reached over and sounded the horn, but did not do so or apply the brakes. His wife applied the brakes. His attempt to steer the car around the boy was manifestly the greatest safety factor that could be performed at that time, and obviously he could not do that and sound the horn at the same time, nor is it apparent that sounding the horn after the boy was in peril would have helped to avoid the accident. The fact that he testified that his wife was trying to

(Weakland v. Chicago and Eastern Illinois Railroad [illegible], 31 [illegible] 142, 149.) It is equally well settled that the burden is on the [illegible] of such a minor to acquit themselves of contributory negligence, [illegible] as to establish negligence on the part of the defendants, and that contributory negligence on the part of a parent [illegible] bar to the action. A long line of cases to that effect is found in [illegible] v. Chicago City Railway Co., 198 Ill. 494, 494.)

There is no testimony in the record which shows that Donald was visible to either of the aviators at a point more than 30 or 35 feet away. According to the witness Hurford, [illegible] the two girls were standing against the oriole well, leaning over and looking down, and Donald was standing beside the mother. The last that Mr. Hurford saw, while standing north of the fence along the north side of the highway, 100 yards east of the culvert, [illegible] road, [illegible] the road, and saw the girls [illegible] that either of aviators, in running in [illegible] line of people on the culvert, could have been [illegible] automobile at any greater distance than Mr. Greene at [illegible]. The plaintiff argues that they should have been much further [illegible]. If the [illegible], they would have seen Donald's mother take him by the hand, and would have had no occasion to conclude that he had left [illegible] out onto the road.

We are not impressed with the argument that Mr. Greene [illegible] to be guilty of negligence by his testimony that [illegible] in peril he could have reached over and handed [illegible] do so or apply the brakes. Mr. [illegible] to steer the car around the boy [illegible] factor there could be performed at [illegible] do that and so did the [illegible] sounding the horn after the boy [illegible] the accident. The fact that he testified [illegible] to

hold the car straight as he attempted to steer it to the left, does not demonstrate that she was guilty of negligence in so doing. The natural inclination of every careful driver is to hold the car on a straight course, and attempting to do so under the suddenness of the happenings in this case does not show negligence on her part. The fact that Mr. Greene grabbed the wheel and steered the car to the left as soon as he saw the child, may have distracted his wife's attention, and may account for the fact that she did not see the child at all until after the impact. Appellant's claim that her short stature and the open ventilator in the cowl obstructed her view is not borne out by the testimony.

The rule long established and often announced, is that liability for negligence must be based upon such relationship between the act complained of and the injury that the former may be said to be the proximate cause of the latter. (Walaite v. Chicago, Rock Island and Pacific Railway Co., 376 Ill. 59, 61.) A failure to comply with an ordinance or a statute is merely prima facie evidence of negligence, and if it does not cause or contribute to cause the injury complained of, such failure does not impose a liability. If the negligence does nothing more than furnish a condition by which the injury is made possible, and the condition causes an injury by the subsequent act of a third person, the two are not concurrent and the existence of the condition is not the proximate cause of the injury. Or, if an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause and refuse to trace it to that which is more remote. (Curran v. Chicago and Western Indiana Railroad Co., 289 Ill.111 119).

hold the car straight [illegible] attempted to steer it [illegible] left, does not demonstrate that the was guilty of negligence in so doing. The natural inclination of every driver is to hold [illegible] on a straight course, and attempting to do so under the circumstances of the happenings in this case does not show negligence on her part. The fact that Mr. Greene grabbed the wheel and steered the car to the left as soon as he saw the child, may have distracted the wife's attention, and may account for the fact that she did not see the child at all until after the impact. Appellant's claim that [illegible] at time and the open ventilator in the cowl obstructed her view is not borne out by the testimony.

The rule long established and often announced, is that liability for negligence must be based upon such reasonable probability that the consequences of and the injury that the former may be said to be the proximate cause of the latter. (Wabash v. Chicago, Rock Island and Pacific Railway Co., 276 Ill. 59, 61.) A failure to comply with an ordinance or a statute is merely prima facie evidence of negligence, and if it does not cause or contribute to cause the injury complained of, a failure does not impose a liability. If the negligence does nothing more than furnish a condition by which the injury is made possible, and the condition causes an injury by the independent act of a third person, the two are not concurrent and the existence of the condition is not the proximate cause of the injury. [illegible] consequence of a certain wrongful act or omission, but may, through or by means of some intervening cause, [illegible] as a direct and immediate consequence, and [illegible] to the last or proximate cause and refuse to trace it back to a more remote. (Gunn v. Chicago and Eastern Illinois [illegible], 90 Ill. 115).

The law as to excessive speed as negligence in such cases is concisely stated in Morrison v. Flowers, 308 Ill. 189, 197, where the court said in the opinion:

> "When a motor vehicle is proceeding along at a lawful speed and is obeying all the requirements of the law of the road and all the regulations for operation of such machine, the driver is not, as a general proposition, liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid the injury; but if one is running his automobile at a speed in excess of the statutory limit or at an unreasonable or dangerous speed, he cannot escape liability because the child who ~~was~~ injured ran in front of the automobile so suddenly that the accident was then unavoidable."

The Motor Vehicles act (par. 146, supra), does not put a limit of forty miles per hour on automobiles travelling in the open country. It provides that no person shall drive any such vehicle upon any highway in this State at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person.

With ~~the~~ a group of people standing against a culvert wall which is three feet away from the edge of the pavement, and the car ahead having sounded a warning horn, it cannot be said that all reasonable minds would agree that a speed of forty-five miles an hour was greater than was reasonable and proper or was in violation of any provision of paragraph 146 of the Motor Vehicles act. That question was one of fact for the jury. (Kirman v. Hutchinson, 254 Ill. App. 469, 476.)

The record shows that Mrs. Wall heard the horn of the car which was only a short distance ahead of the Greene car, observed its speed, saw both cars, and taking Donald by the hand told him to wait until the "cars" got by, but as soon as the first car passed, he jerked loose and darted out in front of the Greene car. It is apparent that if the Greene car had sounded its horn, it would not have afforded her any more warning than she already had. We do not think all reasonable minds would agree that the manner in which she held Donald's hand was, or was not, contributory negligence on her part. That was also a question of

The law [illegible] to excessive speed [illegible] [illegible]

concisely stated in Morrison v. Stearns, [illegible] 187, 189, [illegible] as

the court said in the opinion:

> "When a motor vehicle is proceeding along a highway at a dangerous speed and is staying at [illegible] the conditions [illegible] road and all the requirements [illegible] driving, the driver is not, as a general proposition, [illegible] injuries received by a child who [illegible] so suddenly that the driver could not avoid [illegible] the injury; but it may be a question for the [illegible] in excess of the statutory limit is in itself [illegible] or dangerous speed, so control exists if [illegible] who [illegible] injured [illegible] that the [illegible] [illegible]."

The motor vehicle at issue [illegible] a speed limit of forty miles per hour on automobiles [illegible] company. It provides that no person [illegible] way in the State [illegible] speed greater than [illegible] having regard to the traffic and the use of the way [illegible] to endanger the life or limb or injure the property of any person.

With the exception of people [illegible] these facts [illegible] sounded a warning [illegible] would appear that a speed of forty-five [illegible] was reasonable [illegible] gr pb 148 of the motor [illegible] the jury. (Mirza v. Mercer [illegible], [illegible] 1950).

The record [illegible] was only a short [illegible] saw both cars, and [illegible] "cars" got by, but [illegible] darted out in front of the car [illegible] Grounds for [illegible] more warning than [illegible] would agree that [illegible] not, contributory negligence [illegible]

fact for the jury. (West Chicago Street Railway Co. v. Liderman, 187 Ill. 463, 474.) It is manifest that the accident would not have occurred if the child had not jerked loose from his mother and darted suddenly out onto the road. There was no occasion for appellees to anticipate he would do so, and under all the circumstances in evidence our conclusion is that appellant failed to show that negligence of appellees, or of either of them, was the proximate cause of the injury. The verdict was not against the manifest weight of the evidence.

We do not agree with appellant's contention that the trial court erred in the giving and the refusal of instructions. Complaint is made as to that part of an instruction which told the jury that if "the jury finds that such want of ordinary care on the part of the parents contributed in any degree to the injury and death of Donald L. Wall, then the plaintiff cannot recover in this case, and you must find the defendants, Charles E. Greene and Jeanette Greene, not guilty". A like instruction was held to be a correct statement of the law in Krieger v. Aurora, Elgin and Chicago Railroad Co., 242 Ill. 544. To the same effect are Munsen v. Illinois Northern Utilities Co., 258 Ill. App. 438; Bushman v. Calumet and Southern Railway Co., 214 Ill. App. 435.

Another given instruction which stated that "if the jury believe from the evidence that such want of reasonable care and oversight contributed directly to the injury, then the plaintiff cannot recover," was likewise correct. (True v. Woda, 201 Ill. 315.)

The fifth instruction told the jury that if they "find from the evidence, that the parents, or either of them, at the time of the accident, knowingly allowed Donald L. Wall to go into a place of danger where he was injured, or neglected to exercise ordinary care and prudence in keeping control of his action, and if you believe from the evidence

[illegible]

not for the jury. [illegible]

187 III. 465, 474. [illegible]

[illegible] assumed if [illegible]

suddenly out onto the road. [illegible]

anticipate [illegible] dence our abnormal [illegible] of apparatus, [illegible] injury. [illegible] lence.

[illegible]

[illegible] ground in the jury, [illegible] as to that [illegible] jury times [illegible] contributed [illegible] then the [illegible] defendants, [illegible]

like [illegible]

Kingsley v. [illegible] the same effect [illegible] App. 436; Bowman [illegible] 436.

[illegible]

from the [illegible] contributed [illegible] was liable [illegible]

The fact [illegible] evidence, [illegible] evident, [illegible] where he was [illegible] in keeping [illegible]

he did go into a place of danger, and his exposure thereto, rather than the negligence of the defendants, or either of them, or equally with the negligence of the defendants, or either of them, was the proximate cause of the death, then there can be no recovery". The claim that this instruction does not contain the necessary element that the boy got into a place of danger by reason of the parent's neglect or failure to exercise ordinary care and prudence, is without merit. The instruction expressly couples the negligence of the parent with the child's going into a place of danger, and could not be misunderstood.

The 11th instruction "that if you find from the evidence, that the accident in question was an accident purely, for which no one was to blame, then you must find the defendants not guilty", is complained of as assuming that the occurrence was an accident, which was the question the jury were called upon to determine, and that it omits the question of negligence of the defendants. An instruction which employed the word "accident" was criticized in Peters v. Madigan, 262 Ill. App. 417, 425, because the court said that neither party claimed that the collision involved in that case between two automobiles was an accident, but the case was reversed on other grounds. That reasoning does not apply here. The term "accident" is used with different meanings, including unforeseen events occurring without human agency, but as connected with the conduct of persons it means an unforeseen event for which someone may or may not be responsible. (Carson, Pirie, Scott & Co. v. Chicago Railways Co., 309 Ill. 346, 351.) Collisions between automobiles or with other agencies, and between automobiles and pedestrians are commonly, and practically universally, spoken of as "automobile accidents", whether negligence, or wanton and wilful conduct,

be die go into a place of danger, [illegible] then the negligence of the defendant, or failure of them to equally with the negligence of the plaintiff, or failure of him, was the proximate cause of the injury. [illegible] of in that the instruction does not [illegible] that the boy got into a place of danger by reason of the plaintiff's negligent or failure to exercise ordinary care and prudence, is without merit. The instruction complained of [illegible] the mere fact of the presence with the children [illegible] danger, [illegible] be misunderstood.

The fifth instruction [illegible] evidence that the accident in question [illegible] accident proved, for which no one was to blame, then you must find the defendant not guilty, is complained of [illegible] assuming that the [illegible] children, which [illegible] question [illegible] are [illegible] to negligence, and [illegible] of making [illegible] conduct. [illegible] word "accident" was [illegible] in [illegible] 420, because the court [illegible] jury of [illegible] the collision involved in the case [illegible] accident, but the case was covered by other grounds. [illegible] here. The term "accident" is [illegible] unforeseen events occurring without [illegible] or connected with the conduct of persons it means [illegible] someone may or may not be responsible [illegible] v. Chicago Railway Co., [illegible] modified or [illegible] trains [illegible] collision", meaning [illegible]

or accidents purely, are involved. By this common use and understanding of the term "accident", as first used in the instruction, nobody would conclude or understand from the instruction that the court was indicating that the occurrence was in fact a mere accident. The further words: "was an accident purely, for which no one was to blame", covers the question of negligence of both parties. (Bentkowski v. Bryan, 299 Ill. App. 217), and the jury could not have been misled by the instruction. Instructions are to be interpreted, not by hypercritical criticism, after research and exploration by diligent counsel intent on finding some defect, but as they would be understood by the jury reading them to inform themselves as to the law. What is said here applies also to the fifth instruction.

The claim that the words "proximate cause" are nowhere defined in the instructions, is answered by our expressions in Fippinger v. Glos, 190 Ill. App. 238, and Douvia v. City of Ottawa, 200 Ill. App. 131.

The claim that instruction No. 9 on the measure of damages does not limit the jury to the evidence in determining whether appellees were guilty of negligence which was the cause of the injury and resulting death, is answered by the fact that instruction No. 5 on the same subject, given at the instance of appellant, is subject to the same criticism. Furthermore, it does not direct a verdict and refers to the other instructions given by the court which limit the jury to a consideration of the evidence.

The third given instruction told the jury that if they find from the evidence that the defendants were operating their automobile at the time of the accident and immediately prior thereto in an ordinarily careful and prudent manner and that the decedent darted in front of it so suddenly that the defendants could not stop or turn aside or otherwise avoid injuring the child, then the defendants cannot be found guilty

or accidents merely, are involved. [illegible] measuring of the term "accident", a fine [illegible] conclude or understand from the instructions [illegible] indicating that the conference was a fact [illegible] solution. [illegible] words "was an accident merely, for which no one [illegible] question of negligence of both parties. (Bunnell v. [illegible], 290 Ill. App. 214), and the jury could not have been misled by the instruction. Instructions are to be interpreted not by [illegible], but after reasoning and explanation by [illegible] consider some defect, but as they would be understood [illegible] the jury [illegible] them to inform themselves as to the law. [illegible] to the fifth instruction.

The claim that the words "proximate [illegible] in the instructions, is answered by the [illegible] Elge, 190 Ill. App. 466. [illegible] v. City of [illegible] 181.

The claim that instruction No. 3 on [illegible] not limit the jury to the evidence [illegible] were guilty of negligence which [illegible] death, is answered by the fact that instruction No. 8 [illegible] ject, given on the instance of [illegible] claim. Furthermore, it does not [illegible] other instructions [illegible] tion of the evidence.

The third given instruction [illegible] the evidence that the [illegible] the time of the accident [illegible] careful and prudent manner [illegible] so suddenly that the defendants could not [illegible] avoid injuring the child, then the [illegible]

of negligence which was the proximate cause of the injury and resulting death. The criticism that it does not define the words "an ordinarily careful and prudent manner" is without merit. Such words are in common use and are commonly understood. (Devine v. Northwestern Elevated Railroad Co., 265 Ill. 641, 644.) The claim that the jury would necessarily understand from the instruction that if the decedent suddenly darted in front of the automobile, and "thereafter" there was not sufficient time to avoid the injury, there could be no recovery, is equally untenable. It is in no way susceptible of such a construction, but expressly embraces the time of the accident and immediately prior thereto. Nor is it subject to the criticism that it submits the ultimate question without stating the facts upon which to predicate the finding.

The eighth instruction is almost an exact copy of an instruction expressly approved in Wabash Railroad Company v. Smith, 162 Ill. 583, 588.)

The seventh instruction on the measure of damages is criticised because it told the jury they could only estimate the damages to the parents on the basis of what the evidence shows the son's services would have been worth to his parents and what they could have reasonably expected in a pecuniary way from him during his "continued life", deducting therefrom costs and expenses of the parents in his support and maintenance. The claim that the jury would understand from the words "continued life", that it meant the few minutes between decedent's injury and death is so clearly unsound as to need no comment. Furthermore, appellant used the same words quoted in his fifth instruction. The claim that the jury were not limited to the child's minority in deducting the costs and expenses of his maintenance, was to appellant's advantage, and he cannot complain of it.

of negligence which was the proximate cause of the injury or resulting death. The criticism that it does not define the "an ordinarily careful and prudent manner" is without merit. Such words are in common use and are commonly understood. (Denver v. Lynch, Western Elevated Railroad Co., 208 Ill. 643, 648.) The [illegible] the jury would necessarily understand from the instruction that the locomotive engineer acted in front of the automobile, and "ordinarily careful" meant was not sufficient time to avoid the injury, then could he recover? It is equally uncertain. It is in no way ascertainable of such instruction but a probably correct one is the time of the accident and immediately prior thereto. Now, it is plain to the court, that the jury, in determining the ultimate question without stating the facts upon which to predicate the finding.

The eighth instruction is almost an exact copy of the instruction expressly approved in Wabash Railroad Company v. Smith, 109 Ill. 388, 388.)

The seventh instruction on the measure of damages is criticized because it told the jury they could only estimate the damages to the parents on the basis of what the evidence shows the minor children would have been worth to their parents, and that they could not [illegible] only expected in a pecuniary way. From the [illegible] "fair" deducting therefrom such sum as it may [illegible] and maintenance. The objection to the phrase "[illegible]" words "[illegible]" [illegible] meant to [illegible] engineer's injury and death is so clearly unintentional [illegible]. Furthermore, no client used the same words quoted [illegible] tion. The claim that the jury were not limited [illegible] ity in deducting the costs [illegible] appellant's advantage, and he cannot complain of it.

Appellant's refused instruction that pecuniary loss is presumed as a matter of law, where the deceased left lineal kindred surviving, even though the deceased was a minor at the time of his death, was covered by the other given instructions.

We find no reversible error in the record, and the judgment is affirmed.

Judgment affirmed.

Appellant's refusal instruction was properly refused as a matter of law, there was ample evidence to sustain the verdict, even though the force used was [illegible] to kill, it was covered by the other given instructions.

We find no reversible error in the record, and the judgment is affirmed.

Judgment affirmed.

GEN. NO. 9897 AGENDA NO. 3

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1943.

ROY F. OGILBY, AS ADMINISTRATOR OF THE ESTATE OF FREDERICK OGILBY, DECEASED, Appellee,	
vs.	APPEAL FROM CIRCUIT COURT WINNEBAGO COUNTY.
GEORGE SCHMAUSS, JR., Appellant.	

HUFFMAN - J.

Action by appellee-administrator under the Guest Act, for wrongful death. Verdict for appellee-administrator for $5000. Defendant appeals.

On October 10, 1941, appellant and four of his friends, Gerard LaFond, Patricia Palmer, Gloria Barnum, and plaintiff's intestate, attended a football game in Aurora. The parties lived in Rockford. On the way home that night, at about 10:30, as appellant's car was approaching the intersection of route 30 with route 47, it turned over several times, killing plaintiff's intestate.

The evidence of Gerard LaFond is that appellant had planned the trip to the game in advance; that the parties

drove to Aurora, where they attended the game; that after the game, they started back to ~~Peoria~~ Rockford; that the weather was clear and the pavement dry; that as soon as they left the city of Aurora, they attained a speed of from 60 to 65 miles an hour; and that this speed was maintained.

Appellant was travelling west on route 30. Approximately seven miles out of Aurora, this route intersects with route 47, which runs north and south. Route 30 does not cross route 47 at this junction point. As it approaches 47, it branches into a "Y" with one branch of the "Y" turning to the north for intersection with 47, and one branch turning to the south to accommodate travel from route 30 that desires to turn south on 47.

The witness, LaFond, further states that as appellant approached the point on route 30 where it branches to the north and to the south, that appellant started to turn the car upon the right fork of the "Y", and that after doing so, he then endeavored to turn the car upon the left fork of the "Y" which caused the rear end of the car to skid and swing around. He says the car was going broadside at the intersection, and that the back end was doing the moving. The result was the car left the road, went across route 47, turned over several times, killing two of the occupants.

A car driven by Mr. Pennock, general secretary of the Y.M.C.A., at Rockford, was approaching the junction of 30 with 47, immediately prior to the accident. Route 30

was a usual, concrete highway about twenty feet in width. With Mr. Pennock were his wife, two sons and another young man. He states he was familiar with the junction of 30 and 47; that he had travelled these highways many times; that it is approximately seven miles out of Aurora; that he saw appellant's car as it passed his car just before reaching the "Y" in the pavement on route 30. This witness states he was travelling about thirty-five miles an hour. He saw the car turn over, break down the telephone pole, pass across route 47, and into the ditch. Mrs. Pennock, who was riding in the front seat with her husband, states that in her opinion, appellant's car was travelling sixty miles an hour at the time it passed the Pennock car.

Allen Hermanson, another witness, had attended the game in company with three other young men. The car in which he was riding came to the junction of 30 and 47; stopped at the stop sign; took the north fork of the junction and turned to the right on 47. He states that just as the car in which he was riding started to enter route 47, that the accident in question happened; that he saw appellant's car just before it reached the fork in the road, saw it pass out of sight, and then saw it cross route 47 about ten feet up in the air. He states in his opinion, as he saw it approach the "Y" it was travelling sixty-five miles an hour.

The witness, Pierre Vinet, was riding in the car with Allen Hermanson. He states he saw appellant's car just before it reached the place in route 30 where the pavement

[illegible]

[illegible] a week, [illegible] of [illegible]

With Mr. Peacock [illegible] a [illegible]

man. He stated he [illegible] the [illegible]

and 47; that he had [illegible] ;

that it is [illegible] ; that

he saw [illegible]

regarding the [illegible] on [illegible]

stated he was [illegible] about [illegible]

He saw the car turn [illegible] road [illegible]

back across route 17, and into the [illegible] . [illegible],

who was riding in the front seat with [illegible] ,

that in her opinion, [illegible] to [illegible]

miles an hour at the [illegible] .

Allen [illegible]

[illegible] in conversation with [illegible] ,

which [illegible] stated [illegible] ;

stopped at the [illegible] ;

[illegible] to the [illegible] ,

the car in which [illegible] ,

that the occupant in the [illegible] ; that [illegible]

car just before it reached the [illegible] ,

out of sight, and [illegible]

up in the air. He stated in his [illegible] ;

[illegible] "If [illegible]

The witness, [illegible] ,

Allen Hammerson. He stated [illegible]

before it [illegible] .

divides to the north and south for junction with route 47; and that he saw the car leave the pavement and turn end over end, reaching a height of twelve or fifteen feet as it passed over route 47.

The only testimony in the record pertaining to the accident is that of plaintiff.

Appellant argues nine points for reversal, with several subdivisions. First being that plaintiff failed to prove the defendant guilty of willful and wanton misconduct. We can not subscribe to this position of appellant. It is not necessary that ill will or actual intent to injure be present. It is not to be presumed that appellant had any intent to overturn his car and thus endanger his life as well as the other occupants. The evidence shows that as route 30 approaches route 47, there are some five luminous signs indicating the junction and the forks in the pavement of route 30, together with the stop signs. The evidence is that appellant heeded none of these signs and did not stop for the junction of route 30 with route 47. It is our opinion that under the evidence, the jury was amply justified in concluding that appellant due to his excessive rate of speed lost control of his car, which caused it to leave the highway, with the resulting injuries.

The fourth point urged by appellant is that a special interrogatory was given the jury, without affording defendant an opportunity to object. The interrogatory read: "Was

divide to the north and south for [illegible] with route 47; and that he was the one [illegible] and, reaching a height of twelve [illegible] it crossed over route 47.

The only testimony in the record pertaining to the accident is that of plaintiff.

Assuming arguendo that [illegible], with several qualifications. First being that [illegible] the defendant put the [illegible] and [illegible] testimony. We can not subscribe to this condition of [illegible]. It is not necessary that it will or actual [illegible] to happen, happens. It is not to be presumed that [illegible] are latent to overturn his own and [illegible] the [illegible] occurrence. The evidence [illegible] approaches route 47, there are [illegible] which identify the junction and the [illegible] of route 40, [illegible] with the [illegible] route. The evidence is that [illegible] the junction of [illegible] route 47. It is [illegible] that under the evidence, the jury [illegible] in [illegible] finding that [illegible] the [illegible] lost control of his car, which [illegible] the highway, [illegible] the [illegible].

The fourth point [illegible] by [illegible] interrogatory was given the jury, [illegible] the defendant an opportunity to object. The interrogatory read: [illegible]

the defendant, George Schmauss, Jr., guilty of willful and wanton misconduct immediately before and at the time of the accident on October 10, 1941, when Frederick Ogilby, deceased, was a passenger in the automobile operated by the said George Schmauss, Jr.?" To this interrogatory, the jury answered, "Yes." Under Section 65 of the Practice Act, special interrogatories should be submitted to the adverse party before argument to the jury. This enables adverse counsel to submit other interrogatories, if desired, and an opportunity to direct their arguments toward the particular point covered by the interrogatory. It also affords counsel opportunity to raise a question of the propriety of submitting the interrogatory. However, where it appears no objection was interposed to the giving of the interrogatory when read, and the record discloses none, a party can not complain upon appeal. Racine Fuel Company v. Rawlins, 377 Ill. 375, 382. Furthermore, this action is under the Guest Act. The case went to the jury on one count, which charged willful and wanton misconduct. That was the issue before the jury, as recovery could not be had on any other ground. A general verdict of guilty, under such circumstances, would necessarily be of the same effect though no interrogatory had been given. The verdict of the jury here is a general verdict for plaintiff.

Appellant's points 2,3,6 and 7 relate to instructions. Three instructions were given on behalf of appellee, and twelve on behalf of appellant. It appears the jury was fully

the defendant, George [illegible], Jr., [illegible] was
warden misconduct immediately before and [illegible]
accident on October 10, 1961. Upon Plaintiff's [illegible]
[illegible], was a passenger in the automobile [illegible] by the
said George [illegible], Jr.," in this interrogatory, the jury
answered, "Yes." Under Section 85 of the [illegible]
special interrogatories could be submitted [illegible]
party before argument to the jury. [illegible]
counsel to submit other interrogatories [illegible]
opportunity to direct their arguments [illegible]
points covered by the interrogatory. [illegible]
opportunity to argue [illegible] the propriety of submitting
the interrogatory. Without, [illegible]
ion was interposed to the giving of the interrogatory [illegible]
read, and the jury's disagreement [illegible]
upon appeal. Jones Tool Company v. Hawkins, [illegible], 392,
398. Furthermore, [illegible] case went to the jury on one count, [illegible]
and another misconduct. Thus we [illegible]
as recovery [illegible] be found in any [illegible]
verdict of guilty, under [illegible]
only be of the same effect [illegible]
given. The verdicts of the jury [illegible]
for [illegible].

Assignment [illegible] 1, 2, 3, and 7 [illegible]
Three interrogatories were [illegible] on behalf of [illegible]
twelve on behalf of [illegible]. It [illegible]

and fairly instructed on behalf of the parties. We are not of the opinion it was misled by any of the instructions complained of, or that appellant's rights were prejudiced thereby. Appellant's points 5, 8, and 9 have been considered. The court is not of the opinion reversible error exists in any of the same.

The judgment is therefore affirmed.

Judgment affirmed.

Dom, J. Dissents

and family [illegible] . [illegible] of the opinion it was [illegible] of the [illegible] complained of, [illegible] thereby. Appellants [illegible] attaxed. The court is [illegible] estate in any of the [illegible].

The judgment is [illegible].

[illegible]

GEN. NO. 9898 AGENDA NO. 4

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A.D. 1943.

CLIFTON FRED BARNUM, AS ADMINISTRATOR OF THE ESTATE OF GLORIA MAE BARNUM, DECEASED, Appellee	
vs.	APPEAL FROM CIRCUIT COURT WINNEBAGO COUNTY.
GEORGE SCHMAUSS, JR., Appellant.	

HUFFMAN - J.

This is a companion case to Gen. No. 9897 (Roy F. Ogilby, as Administrator of the Estate of Frederick Ogilby, deceased, vs. George Schmauss, Jr.), submitted at the same term of court. The evidence on behalf of appellee in this case is substantially the same as in Gen. No. 9897. Appellant offered no testimony by any witness to the accident. Trial resulted in verdict for appellee in the sum of $10,000. By consent of plaintiff-appellee, a remittitur was entered for $2500, and judgment on verdict rendered by the court for $7500, and costs. Appellant brings appeal.

We do not consider it necessary to restate the evidence of the witnesses in this case, as the same parallels that in Gen. No. 9897, in which opinion the evidence on behalf of plaintiff is stated.

Appellant argues five points for reversal in this case. The first three are the same as the first three argued in Gen. No. 9897. The fifth point urged corresponds to the ninth in the companion case. Point four in this case is directed toward the verdict returned, urging that since the same was for the maximum amount under the statute, that it evidenced passion and prejudice on the part of the jury. It is also urged under this point, that counsel for appellee in his argument was guilty of inflammatory remarks, which were of a character calculated to prejudice the jury against the defendant. Argument of plaintiff's counsel appears to be set out in the abstract. We find that upon two occasions, counsel for defendant stated to the court, "I object to this line of argument," whereupon the objection was sustained. While the argument might be considered somewhat heated, yet we do not consider it reversible error in this case.

The sufficiency of the evidence has already been considered in the companion case (Gen. No. 9897). In the absence of error of law intervening, our consideration of the evidence in the companion case is controlling herein.

The judgment is therefore affirmed.

Judgment affirmed.

Dove, J. Dissents

[illegible]

GEN. NO. 9907 AGENDA NO. 9

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1943

BERYL JACOBSON, AS ADMINISTRATOR OF THE ESTATE OF JOHN MARTIN JACOBSON, DECEASED, RESPONDENT,	
vs.	APPEAL FROM THE CIRCUIT COURT OF DeKALB COUNTY.
CHARLES UMLAND AND RACELLE FLEWELLIN, PETITIONERS.	

HUFFMAN, J.

This is an appeal from an order of the trial court granting to plaintiff below a motion for new trial, because of inadequacy of verdict.

Plaintiff's intestate was killed while riding as a guest in defendants' automobile. Trial resulted in a verdict for plaintiff in the sum of $1000. On motion of plaintiff, the verdict was set aside for inadequacy and new trial granted. The defendants below bring this appeal from the order of the trial court granting said motion.

It is generally considered that the right of a trial court to grant a new trial on the ground of erroneous assessment of damages exists both in cases where the amount of the verdict is excessive and where it is inadequate. The amount of damages to be awarded for personal injuries is committed, in the first instance, to the jury, but where a trial court considers that the amount of damages awarded is manifestly or grossly inadequate or excessive, it may exercise its power and grant a new trial. Such power is vested in a court to the extent that its ruling will not be held erroneous unless it appears the court unreasonably exercised the power. Where it appears the court has acted with sound discretion, the same will not be disturbed on appeal.

The order of the trial court granting motion for new trial is affirmed.

Order affirmed.

GEN. NO. 9934 AGENDA NO. 27

153

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1943

JULIA O. ANDERSON, APPELLANT,	)	
vs.	:	APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY.
BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 91, WARREN COUNTY, ILLINOIS, ET AL., APPELLEES.	)	

HUFFMAN, J.

Appellant filed petition for mandamus to compel appellees to reinstate her as a teacher in School District No. 91, in Warren county. Motion was made and granted to dismiss the petition. Appellant elected to stand by same. Judgment for defendant-appellees. Plaintiff appeals.

Action is brought under para. 127-3/4 of the Schools Act (Sec. 136c, Ch. 122, 1941 Ill. St.). Motion to dismiss challenged the constitutionality of the above section; denied the sufficiency of appellant's petition as to employment; denied the

application of said section as applied to appellant's period of employment; denied that any rights had accrued to her by virtue of said section from her employment; and alleged that any rights that might have accrued to her by virtue of such section and employment, had been waived by appellant.

Several grounds are assigned in the motion to dismiss petition other than that raising the validity of the statute. The court does not indicate, and the record fails to show, on what ground the motion to dismiss was sustained. Therefore, by appeal to this court, the question of validity of the statute is deemed waived. (Hackner v. Van Wyck, 381 Ill. 622) The other points raised have only to do with the application of the act to appellant's petition.

Regarding these latter points, appellees advance three propositions directed toward the insufficiency of the allegations of the petition, which briefly may be stated as follows: First, that the petition failed to allege sufficient facts showing appellant was employed by defendant district for two consecutive years, one of which was subsequent to the date the act in question took effect; second, that the petition failed to allege sufficient facts showing the petitioner was employed for a probationary period as specified in the act; and third, that the petition, on its face,

showed petitioner had waived any rights which might have accrued to her by virtue of the statute in question.

Considering the petition in view of the points just above indicated, we are of the opinion that it contained sufficient allegations to require an answer.

The judgment of the trial court is reversed and the cause remanded, with directions to overrule the motion to dismiss.

Reversed and remanded with directions.

GENERAL NO. 9922 AGENDA NO. 17

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1943

Dorothy Guentner, formerly Dorothy Metz, Appellant	)	APPEAL FROM CIRCUIT COURT OF CARROLL COUNTY.
vs.	)	
Hazel Stober, Appellee.	)	

DOVE, J.:-

This is an appeal by the plaintiff in a slander suit from a judgment for the defendant upon a directed verdict in the circuit court of Carroll County.

The original complaint, consisting of five counts, each alleged the utterance and publishing, in a discourse by the defendant in the presence and hearing of another person, of the following slanderous statement: "I heard the conversation between Jo Foltz and Dr. Garland. It was all about you. You were in the family way and that was what your operation was for." The amended complaint charged the utterance of only the last sentence above quoted, and by a sixth count alleged that the defendant caused the slanderous words to be repeated and communicated by divers persons to the Board of Directors of the school where the plaintiff had been employed, resulting in their refusal to re-employ her.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1925

orothy Guenther, formerly orothy Metz,	
Appellant	
va.	
ael Stoben,	
Appellee.	

OVER, J.:-

This is an appeal by the plaintiff in a slander suit from a judgment for the defendant upon a directed verdict in the circuit court of arroll County.

The original complaint, consisting of five counts, each alleged he utterance and publishing, in the presence of the defendant in the presence and hearing of another person, of the following slanderous statement: "I heard the conversation between Jo Kelly and Dr. Gerlach. It was all about you. Jo knew in the family way and that was what our operation was for." The amended complaint alleged the utterance of only the last sentence above quoted, and by a third count alleged that the defendant caused the slanderous words to be repeated and communicated by divers persons to the board of directors of the school where the plaintiff had been employed, resulting in that school re-employ her.

The answer admitted the discourse between the parties, but denied the uttering of the defamatory words in the amended complaint. The answer alleged that the discourse concerned the defendant's niece, Dorothy Dean, Joseph Foltz, and Dr. J. C. Garland; that it also concerned an operation theretofore had by the defendant; a letter written by Joseph Foltz; the relationship between the plaintiff and Dorothy Dean in connection with their employment as school teachers by the board of directors of the school above mentioned; the identity of the person or persons to whom the letter of Joseph Foltz was written; and the effect on the future employment of Dorothy Dean. The plaintiff filed a reply and the issues so made were submitted to a jury for determination resulting in a directed verdict for the defendant as stated.

Appellant testified that on June 3, 1941 she was a single woman and had not been married prior to that time; that she was then a teacher in the Chestnut Park school in Savanna; that on that day she met appellee in the beauty parlor of Grace Sack, now Mrs. Robert Lewis, in Mt. Carroll; that while Grace Sack was shampooing plaintiff's hair, appellee said to her: "And that is what your operation - you were in the family way and that is what your operation was for." The fact that she at first testified she did not recollect that there was a statement involving a conversation between Jo Foltz and Dr. Garland, but recalled it when shown the original complaint, does not tend to discredit her testimony or constitute a variance, as claimed by appellee The proof of the additional conversation did not add to or detract from the charge as to the actionable words in the amended complaint. She further testified that one of the members of the board of directors of the Chestnut Park School told her they had intended to rehire her, but that after he heard the story about her operation "it was all off."

The answer admitted the discovery between the parties, but denied the uttering of the defamatory words in the amended complaint. The answer alleged that the discovery concerned the defendant's niece, Dorothy Dean, Joseph Foltz, [illegible]; that it also concerned an operation therefore had by the defendant; a letter written by Joseph Foltz; the relationship between the plaintiff and Dorothy Dean in connection with their employment as school teachers by the board of trustees of the school district aforesaid; the identity of the person or persons to whom the letter of Joseph Foltz was written; and the effect on the future employment of Dorothy Dean. The plaintiff filed a reply and the issues so made were submitted to a jury for determination resulting in a directed verdict to the defendant as stated.

Appellant testified that on June 5, 1941 she was a single woman and had not been married prior to that time; that she was then a teacher in the Chestnut Park school in Bayonne; that on that day she met appellee in the beauty parlor of Grace Cook, one Mrs. Robert Lewis, in Mt. Carroll; that while Grace Cook was shampooing plaintiff's hair, appellee said to her: "And that is what your operation - you were in the family way and that is what your operation was for." The fact that she at first testified she did not remember that there was a statement involving a conversation between Mr. Foltz and Dr. [illegible], but recalled it when shown the original complaint, does not tend to discredit her testimony or constitute a variance, [illegible]. The proof of the additional conversation did not add to or alter the charge as to the actionable words in the [illegible]. She further testified that one of the members of the board of directors of the Chestnut Park School told her they had intention to replace her, but that after he heard the story about her operation he was [illegible].

The records of the school board indicate that she was not re-employed because of the story, but there is no testimony which shows that the school board heard the story through appellee.

Dr. W. L. Karchner testified that he performed a surgical operation upon appellant by curreting the uterus because she was menstruating every two or three weeks and flowing profusely; and that in his opinion she was not pregnant.

Mrs. Robert Lewis, called as a witness by appellant testified there was a conversation between appellant and appellee on the occasion in controversy; that the beauty parlor was about 10 feet by 15 feet in size; that she left the room as soon as the conversation started; that at the first sentence she knew there was going to be a quarrel and it wasn't any of her business, and that she did not remember what she heard stated there; that there might have been things stated but that after she started hearing the quarreling, she left, and may have stayed away half an hour; that she went out in the back yard if it was nice, and it was nice in the back yard; and that when she came back in, neither of the parties was talking. During the course of her examination, upon objection by appellee's counsel that she was being cross-examined by appellant's counsel, the latter asked the court to make her a court witness, which was done, after which her testimony was substantially the same,-- that is, that she did not remember anything that was said. She concluded her testimony with the statement that "This is the first I have known about the conversation that even went on between the two people. I heard nothing that I could repeat to anybody else."

Appellee, called as an adverse witness by appellant, testified that she heard the testimony of Dr. Karchner and of appellant, and denied that she, the witness, made any reference to any operation, in the beauty shop, at any time whatsoever.

42605

FRED J. BROWN,
Appellee,

v.

JOSEPH ZAUBAWKY, etc.,
et al.

MARCIONA ZAUBAWKY, also known
as MARCIONA ZAUBAWCZES,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

321 I.A. 297

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendants, Joseph Zaubawky and his wife Marciona, were the owners, as joint tenants, of an apartment building at 528-530 South Lawndale avenue, Chicago. November 10, 1940, the plaintiff, Fred J. Brown, was severely injured while walking down a stairway in the building used in common by all the tenants, through the alleged failure of defendants to maintain proper lighting along the stairway. August 15, 1941 he brought suit for damages resulting from the injuries sustained. The sheriff's return showed that on August 18, 1941 he had served process on Joseph Zaubawky by leaving a copy of the summons with his wife, informing her of the contents thereof, and also by sending a copy through the United States post office in a sealed envelope addressed to defendant Joseph Zaubawky; and had served Marciona Zaubawky by leaving a copy of the summons with her personally at the place where the parties resided. Neither of the defendants appeared in the proceeding, and accordingly on October 10, 1941, when the cause was regularly reached for trial, and pursuant to an ex parte hearing, the court found the issues in favor of plaintiff, assessed his damages at the sum of $5,400, and entered judgment on the finding. Execution issued thereon November 13, 1941 and was served upon the defendants. Thereafter, on March

Civil No. [illegible]

v.

JOLLEN [illegible], etc.,
et al.

MARILYNA [illegible], also [illegible]
as [illegible]
[illegible]

MR. [illegible]

[illegible]

were the owners, as joint tenants, of [illegible] at
820-820 South [illegible] Avenue, [illegible], Oregon, [illegible] 1960,
the plaintiff, [illegible], [illegible] [illegible]
walking down a [illegible] in the [illegible] [illegible]
the tenants, through the [illegible] of [illegible] to
maintain proper lighting [illegible] [illegible] [illegible] 1961, [illegible]
be brought suit for [illegible] [illegible]
tained. The chronicle [illegible] [illegible] [illegible]
be and proved [illegible] on [illegible]
the [illegible] with the [illegible] [illegible]
of, and also [illegible] [illegible]
office in a [illegible]
[illegible] and had [illegible]
of the [illegible] with [illegible]
parties [illegible]
proceeding, [illegible]
came [illegible]
ex parte [illegible] the [illegible]
tiff, [illegible]
judgment on the [illegible]
1941 and [illegible] served [illegible]

24, 1942 they filed their joint and several motion in the nature of error coram nobis to vacate the judgment and default pursuant to section 72 of the Civil Practice act (par. 196, ch. 110, Ill. Rev. Stat. 1943), alleging in substance that Joseph Zaubawky was 72 years old and his wife Marciona aged 63; that on March 25, 1941 Joseph had undergone an appendectomy at the Holy Cross Hospital and was there confined for approximately two weeks; that thereafter, on April 19, 1941, he was struck and injured by an automobile and taken to the Cook County Hospital, where he remained until April 30, 1941, during which time he was in an unconscious condition as a result of injuries sustained; that on the last mentioned date he was transferred to the Garfield Park Hospital, where he remained until May 10, 1941, and during a part of that time he was in an unconscious condition as a result of his injuries; that he had never fully recovered, had been treated regularly since being discharged from the Garfield Park Hospital, and was still being treated on the date the summons was served upon him and on the date default and judgment were entered; that as a result of his age and injuries to his head, he was, during all the time since April 19, 1941 and until after the entry of judgment on October 10, 1941, confused and irrational, with consequent loss of memory, and his mind was so affected that during all that time and for a long period thereafter he had been mentally incompetent to transact business of any kind or attend to any lawsuit. With respect to Marciona Zaubawky, the petition alleged that at the time summons was served and default and judgment entered, she was senile and mentally incompetent to comprehend the nature and effect of the summons and incapable of transacting any business or attending to the defense of the suit; and that at the time of the entry of the judgment against both defendants, the court was not advised of these facts and

24, 1941 they filed their joint and separate [illegible]
of error [illegible] to vacate the judgment [illegible]
to section 77 of the Civil Practice Act [illegible]
Nov. 4th, 1941). [illegible]
was 77 years [illegible] ; [illegible]
28, 1941 George [illegible] [illegible]
hospital and was [illegible]
that therefore, on April [illegible]
by an automobile [illegible]
be remained until April [illegible]
an unconscious condition [illegible]
that on the last [illegible] was transferred to the
Garfield Park Hospital, where he remained until May 10, 1941,
and during a part of that time he was in an unconscious condi-
tion as a result of his injuries; that he never fully
recovered, had been [illegible] [illegible] discharged
from the Garfield Park Hospital, and was [illegible]
on the date the [illegible] was served upon him and on the date
default and judgment were entered; that as a result of his [illegible]
and injuries to his [illegible] he was, during [illegible]
April 10, 1941 and until after the entry of judgment on
October 10, 1941, confused and irrational, with considerable
loss of memory, so [illegible] so affected that [illegible]
that time and for a long period [illegible]
incompetent to [illegible] of any kind or [illegible]
lawsuit. With regard to [illegible] defendant, the [illegible]
alleged that at the time [illegible]
judgment entered, he was [illegible]
comprehend the nature and effect of the [illegible]
of transacting any business or [illegible]
suit; and that at the time [illegible] entry of the judgment against
both defendants, the court was not advised of those facts and

if it had been advised of the mental condition of the defendants, it would not have entered judgment against them without the appointment of a guardian ad litem to defend their interest.

Attached to the petition were the supporting affidavits of defendants' son and Dr. Frank Chauvet, the attending physician at the Garfield Park Hospital, who alleged that during the time he treated Joseph Zaubawky, from April 30 to May 10, 1941, the latter was in a confused and irrational state of mind because of injuries to his head, and continued to remain in that condition after he was discharged from the hospital and until November 1941.

Plaintiff answered the petition, denying the substantial allegations thereof, and a full hearing was thereupon had before the court, in which numerous witnesses appeared, including both defendants; their son and Dr. Chauvet testified for the defense, and plaintiff, Dr. Leo A. Kaplan and two lay witnesses testified on behalf of plaintiff. At the conclusion of the hearing the court found that due process was had on both defendants, that "there was nothing wrong with the wife except worry," but that "there may be some question as to his [the husband's] mentality;" and entered the order from which Marciona Zaubawky alone appeals, overruling the motion to vacate and set aside the judgment as to her, but ordering the judgment entered against Joseph Zaubawky to be vacated, set aside and held for naught.

Various points are urged as grounds for reversal on behalf of Mrs. Zaubawky. We have no hesitancy in affirming the judgment as to her, and since no appeal or cross appeal was taken as to the order setting aside the judgment against Mr. Zaubawky, we have no jurisdiction to pass upon the propriety of that order. The question as to what errors may be corrected by motion under section 72 of the Practice act,

[illegible]

[illegible] Lake [illegible] out the [illegible] of [illegible] in [illegible] interest.

[illegible] to the [illegible] of [illegible] activity of [illegible] However, the attending physicians [illegible] the [illegible] I. [illegible] I. No alleged [illegible] in the [illegible] from April 1[illegible] to [illegible] 1, 1[illegible] [illegible] and irrational [illegible] and continued to [illegible] charged from the [illegible] April [illegible].

Liability [illegible] Allegations that [illegible] Illegations that [illegible] the court, in which [illegible] defendants [illegible] and plaintiff, [illegible] [illegible] that on [illegible] 1[illegible] [illegible] the [illegible] the [illegible] [illegible] that there was nothing [illegible] but that there [illegible] [illegible] [illegible] [illegible] [illegible] alone opinion, [illegible] the [illegible] the [illegible] [illegible] [illegible] for [illegible].

[illegible] on behalf of [illegible] [illegible] the [illegible] [illegible] was taken [illegible] [illegible] [illegible] property of the owner. [illegible] be corrected [illegible] [illegible] [illegible]

the provisions of which are identical with section 89 of the former statute, was fully considered and passed upon in Marabia v. Thompson Hospital, 309 Ill. 147. Plaintiff, in that proceeding, brought an action against the hospital for injuries sustained through the improper application of a hot water bag while she was a patient in the hospital. The defendant not appearing, default was entered and a jury was impaneled, which assessed plaintiff's damages at $3,550, for which judgment was rendered. After the expiration of the term, the hospital filed a petition in the nature of error coram nobis to vacate and set aside the default and judgment, wherein it alleged that summons was served upon a night supervisor of nurses who had nothing to do with the business of the hospital or its management; that she was not on duty at the time of service and informed the deputy sheriff that she had no authority to accept service, but the deputy nevertheless left the summons with her and promised to return and serve it upon the superintendent; that she thereupon left the copy on her desk and neglected to call the defendant's attention to it; that all of the officers of the hospital, including the president, vice president, secretary and treasurer, were in the City of Chicago on the day the writ was served and accessible to service, but none of them was served and no officer or agent of the hospital ever saw the summons or had any notice that the suit was pending until after judgment was rendered and after the term had expired. The petition of the hospital also showed that it was a corporation organized under the laws of Illinois not for profit but solely for the purpose of establishing and maintaining a hospital as a charitable institution, thus rendering it immune from liability for negligence of its servants under the rule of respondeat superior. Notwithstanding these circumstances, the Supreme court held that the motion to vacate a judgment under the Practice act as it then existed, was governed by the same rules

the provisions of which are [illegible] the
former statute, the [illegible]
Marble v. Thorson [illegible] 409 Ill. [illegible]
that proceeding, brought an action [illegible]
injuries sustained through the improper [illegible]
water bag while he was a patient in the [illegible]. The defen-
ant not appearing, default was [illegible]
which amounted [illegible]
was rendered. After the [illegible]
filed a petition in the nature of [illegible]
set aside the default and judgment, wherein it [illegible]
was served upon a night supervisor of nurses [illegible]
with the balance of the hospital [illegible]
not on duty at the time of service and informed the deputy sheriff
that she had no authority to accept service, but the deputy sheriff
thereon left the summons with her and [illegible] to return and serve
it upon the superintendent, but [illegible] left the copy on
her desk and neglected to [illegible]
that all of the officers of the corporation, including a president,
vice president, secretary and [illegible], resided in the city of
Chicago on the day the suit was [illegible]
but none of them was served [illegible]
ever saw the summons or had [illegible]
until after judgment was rendered. [illegible]
The petition of the hospital [illegible]
organized under the laws of [illegible]
the purpose of establishing and maintaining [illegible]
charitable institution, and [illegible]
for negligence of its servants under [illegible]
superior. Notwithstanding these allegations, the [illegible]
court held that the motion to vacate [illegible]
practice set as it then existed, [illegible] the same rules

new page

of practice as prevailed at common law under the writ of error coram nobis; that errors of fact which may be corrected by the act or by writ of error coram nobis under the common law, relate exclusively to the disability of the parties, the incapacity of the plaintiffs to sue, or the disability of the defendants to defend, and which, if known to the court, would have prevented the entry of a judgment; and that when a defendant is served through an agent which the statute declares to be sufficient notice, it cannot, by motion under the act, correct a default judgment by setting up the neglect of the agent to notify the defendant of the service, even though it has a good defense to the action, since the motion does not lie to enable a defendant to set up facts which go to the merits of its defense and which it was its duty to set up by pleading. The circumstances in the Marabia case were much stronger and more favorable to the defendant then the facts in the case at bar, and presented equitable considerations which do not here appear. Numerous cases were cited in support of the court's conclusion that "The defendant in error's character as a charitable institution did not render its situation in any respect analogous to that of an infant, a lunatic, a dead man or a married woman, as contended by it. Such parties were under a personal disability and could neither sue nor be sued, while the defendant in error is under no disability whatever. It is sui juris, may make valid contracts, may sue and be sued, may prosecute and defend the same as an individual. If it is sued it must observe the rules of practice and of court the same as an individual, and if the suit is unfounded it must present its defense to the court if it wants to contest the right." By the same line of reasoning, it may be said that the status of Mrs. Zaubawky in this proceeding was not in any respect analogous to that of an infant, a lunatic, or a dead man. She was not under

[illegible] of [illegible] of [illegible] *corpus mores*; but [illegible] of [illegible] be [illegible] by the act or by [illegible] of [illegible] *corpus mores* [illegible] common law, and to exclusively to the liability of the [illegible], and [illegible] of the plaintiffs to sue, or the [illegible] of the defendants to defend, upon [illegible] to the [illegible], with a [illegible] the entry of a judgment; and [illegible] be served through an agent which [illegible] notice, it cannot, by notice under the [illegible], convert a void judgment by setting up a [illegible] of the [illegible] to notify the defendant of the service, even [illegible] to the action, since the notice [illegible] to set up facts [illegible] of [illegible] and [illegible] it was the duty to set up by pleading. In [illegible] the *Corbin* case were much stronger [illegible] to the defendant than the facts in the case [illegible], and [illegible] equitable consideration which [illegible] not have [illegible]. Numerous cases were cited in support of the [illegible] contention that "the government in [illegible] should [illegible] did not [illegible] the attention [illegible] to [illegible] of an infant, a lunatic, [illegible] or [illegible], [illegible] [illegible] and could neither [illegible] in order to disability [illegible] valid contracts, may [illegible] the same as in [illegible]. [illegible] rules of [illegible] [illegible] if the suit is unconscionable [illegible] to the court if it wants to compel the [illegible] of reasonable, it may [illegible] in this proceeding [illegible] of an infant, a lunatic, or [illegible]. [illegible] under

new page

any personal disability; she was sui juris, could make valid contracts, sue or be sued, and could prosecute and defend lawsuits as an individual, and since no question is raised as to the validity of the service in accordance with the statute, it was incumbent upon Mrs. Zaubawky to present a defense if she wanted to contest the plaintiff's claim. The facts adduced upon the hearing left no doubt in the court's mind as to her competency and mental vigor, and therefore we think the court properly denied her motion to vacate the judgment as to her.

Accordingly the judgment of the Circuit court overruling the motion to vacate and set aside the judgment as to Marciona Zaubawky is affirmed.

JUDGMENT OF THE CIRCUIT COURT
OVERRULING THE MOTION TO VACATE
THE JUDGMENT AS TO MARCIONA
ZAUBAWKY AFFIRMED.

Scanlan and Sullivan, JJ., concur.

any personal liability, the was said further, that the valid contracts, are or be said, to contain reasonable and lawsuits as an individual, and since no question is raised as to the validity of the service in controversy with the statute, it was incumbent upon us, without to present a defense if she wanted to contest the plaintiff's claim. The facts adduced upon the hearing left no doubt in the court's mind as to her competency and mental vigor, and therefore we think the court properly denied her motion to vacate the judgment as to her.

Accordingly the judgment of the circuit court overruling the motion to vacate and set aside the judgment as to Marcioma Hardaway is affirmed.

THE ORDER OF THE CIRCUIT COURT
OVERRULING THE MOTION TO VACATE
THE JUDGMENT AS TO MARCIOMA
HARDAWAY AFFIRMED.

Beamian and Sullivan, JJ., concur.

OK Huffman

General No. 9930 Agenda No. 23

321 I.A. 207

149

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1943.

87/3

Alf Leif, Administrator of the Estate of Carl Leif, Deceased, Appellee vs. Joseph B. Fleming and Aaron Colnon, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation, Appellants.	APPEAL FROM CIRCUIT COURT OF ROCK ISLAND COUNTY.

Dove, J.:

This is a railroad crossing accident case, in which appellee's intestate, a twenty-one year old driver of a milk truck, was killed when a passenger train of the "Rock Island" railroad struck the truck at the 15th Street crossing in the city of Moline on March 13, 1940, at about 6:27 o'clock, A. M. The truck was owned by Katherine Butterworth, doing business as Midvale Dairy Farms, and the decedent was in her employ. The train was an interstate train, known as the "Rocket", enroute from Denver, Colorado, to Chicago, and consisted of seven cars, with a diesel powered locomotive.

Appellee, as administrator of the decedent's estate, brought a suit in the circuit court of Rock Island County against James E. Gorman, Frank O. Lowden and Joseph B. Fleming, as trustees of the railroad

I N R E

[illegible]

[illegible]

October [illegible], [illegible]

Alf Leif, Administrator of the Estate of Oxel Leif, Deceased, Appellee, vs. Joseph R. Fleming and Arthur Dolmer, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, a corporation, Appellants.	[illegible] COUNTY.

Dove, J.:

This is a railroad crossing accident case, in which plaintiff's intestate, a twenty-one year old [illegible] driver of a truck, was killed when a passenger train of the [illegible] railroad struck the truck at the 12th Street crossing in the city of [illegible] on June [illegible], 1930, at about 8:20 o'clock, a. m. [illegible] worth, doing business as Lindale Dairy [illegible] her employ. The truck was [illegible] enroute from Denver, Colorado, to Chicago, and [illegible] with a diesel powered locomotive.

Appellee, [illegible] administrator of the [illegible] suit in the circuit court of Cook County [illegible] Frank C. Lowden and Joseph R. Fleming [illegible] to

company, to recover damages for the benefit of the decedent's next of kin, on account of his alleged wrongful death. James E. Gorman was dismissed as a defendant trustee, and a jury trial resulted in a verdict and a judgment thereon for $6000.00, against the other two trustees, payable in due course of administration of the trust estate. Frank O. Lowden was later dismissed as a trustee defendant, and Aaron Colnon was substituted in his stead. This appeal from the judgment is prosecuted by Joseph B. Fleming and Aaron Colnon as such trustees.

We first notice the contention of appellants that under subparagraph 3 of section 3, and sections 5 and 29 of the Workmen's Compensation act of this State, (Ill. Rev. Stat. 1943, chap. 48, pars. 139, 142, 166), the trial court erred in refusing to allow their motion for leave to amend their answer by adding allegations that decedent and his employer were operating under and bound by the act, and that the accident arose out of and in the course of such employment; that pursuant to the terms of the act, the decedent's parents filed a claim with the Industrial Commission and were awarded compensation on account of his death, which was later satisfied in full by a lump sum settlement and payment of $994.40; that the defendants were engaged in carriage by land and bound by section 3 of the act; that under the provisions of section 29, any right of action to recover damages on account of the decedent's injury and death was transferred to his employer, and that by reason thereof the plaintiff is without capacity to sue herein or to maintain this action; and that in any event the plaintiff cannot recover an amount in excess of the amount of the compensation payable by the decedent's employer as fixed by the order for lump sum settlement.

company, to recover damages for the benefit of the decedent's next of kin, on account of his alleged wrongful death. James E. Gorman was dismissed as a defendant trustee, and a jury trial resulted in a verdict and a judgment thereon for $[illegible], against the other two trustees, payable in due course of administration of the trust estate. Frank C. Lowden was later dismissed as a trustee defendant, and Aaron Colton was substituted in his stead. The appeal from the judgment is prosecuted by Joseph S. Hawkes and Aaron Colton as such trustees.

We first notice the contention of appellants that under subparagraph 3 of section 3, and sections 5 and 29 of the Workmen's Compensation act of this State, (Ill. Rev. Stat. 1943, chap. 48, pars. 138, 142, 168), the trial court erred in refusing to allow their motion for leave to amend their answer by adding allegations that decedent and his employer were operating under and bound by the act, and that the accident arose out of and in the course of such employment; that pursuant to the terms of the act, the decedent's parents filed a claim with the Industrial Commission and were awarded compensation on account of his death, which was later satisfied in full by a lump sum settlement and payment of $[illegible].40; that the defendants were engaged in carriage by land and bound by section 3 of the act; that under the provisions of section 29, any right of action to recover damages on account of the decedent's injury and death was transferred to his employer, and that by reason thereof the plaintiff is without authority to sue herein or to maintain this action; and that in any event the plaintiff cannot recover an amount in excess of the amount of the compensation payable by the decedent's employer [illegible] the order for lump sum settlement.

It is argued that under the above mentioned sections of the statute, appellants, as a carrier by land, and the decedent and his employer, were all under and bound by the act; that the Federal Employer's Liability act applies only to liability of an interstate carrier to its own employees while both are engaged in interstate commerce, and that inasmuch as the Federal statute does not exclusively occupy the field, the State law is applicable. They further rely upon the fact that in addition to being engaged in interstate traffic, the train was also carrying some intrastate passengers who came aboard at Rock Island, Illinois, bound for other points in the State. These contentions of appellants are completely answered contrary to their claims in Goldsmith v. Payne, Director General of Railroads, 300 Ill. 119, where the relations of the parties and the accident were similar to those in the case at bar. Like holdings are found in O'Brien v. Chicago City Railway Co., 305 Ill. 244, 255; Staley v. Illinois Central Railroad Co., 268 id. 356. The only case cited by appellants which lends support to their contentions is Reed v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 220 Ill. App. 6. Obviously we cannot overrule the decisions of the Supreme Court. The proposed amendment to the answers of the defendants did not state any ground of defense, and the trial court correctly denied the motion for leave to file it.

Appellants next claim that the reply to their answer failed to deny their affirmative defense of contributory negligence, and that such defense is therefore admitted. The amended complaint alleged negligence of appellants, and due care and caution on the part of the decedent. The answer traversed these allegations, and in addition thereto, alleged contributory negligence as an affirmative defense, setting out certain facts under six specifications, as constituting such contributory negligence. Appellee replied to this defense by re-alleging the allegation

It is argued that under the above mentioned sections of the statute, appellants, as a carrier by land, and the deceased and his employer, were all under and bound by the act; that the General Employer's Liability act applies only to liability of an interstate carrier to its own employees while both are engaged in interstate commerce, and that inasmuch as the federal statute does not exclusively occupy the field, the state law is applicable. They further rely upon the fact that in addition to being engaged in interstate traffic, the train was also carrying some intrastate passengers who came aboard at Rock Island, Illinois, bound for other points in the state. These contentions of appellants are conclusively answered contrary to their claims in Goldsmith v. Hayes, Director General of Railroads, 300 Ill. 118, where the relations of the parties and the accident were similar to those in the case at bar. Like holdings are found in O'Brien v. Chicago City Railway Co., 305 Ill. 244, 258; Staley v. Illinois Central Railroad Co., 308 Ill. 356. The only case cited by appellants which lends support to their contentions is Lee v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 256 Ill. App. 8. Obviously we cannot overrule the decisions of the Supreme Court. The proposed amendment to the answers of the defendants did not state any ground of defense, and the trial court correctly denied the motion for leave to file it.

Appellants next claim that the reply to their answer failed to deny their affirmative defense of contributory negligence, and that such defense is therefore admitted. The amended complaint [illegible] negligence of appellants, and due care and caution on the part of [illegible]. The answer traversed those allegations, and in [illegible] contributory negligence [illegible] certain facts under six specifications, [illegible] negligence. Appellee replied to this defense [illegible] the allegation

of due care and caution as previously pleaded. The claim of appellant is untenable. There can be no contributory negligence, in contemplation of law, when there is an exercise of ordinary and reasonable care. (Cicero and Proviso Street Railroad Co. v. Snider, 72 Ill. App. 300; North Chicago Street Railroad Co. v. Eldridge, 151 Ill. 542, 549.) Therefore, the issue already joined by the allegation in the complaint of due care and a traverse thereof, embraced the question of contributory negligence. Alleging contributory negligence as an affirmative defense put the burden of proving it upon the defendants, but the plaintiff could not be placed in default by failing to specifically deny each evidentiary fact pleaded in an issue already joined. The reply was sufficient.

On the basis that the evidence shows appellants were not guilty of any actionable negligence, but shows that the decedent was not in the exercise of due care and was guilty of contributory negligence, it is urged that the trial court erred in refusing to give the peremptory instruction asked by appellants at the close of the testimony for appellee and at the close of all the testimony, and in refusing to allow appellants' motion for judgment non obstante veredicto. The testimony shows the following facts: 15th Street in the City of Moline runs north and south across 4th Avenue, an east and west thoroughfare, and on across nine railroad tracks lying north of 4th Avenue, to the Mississippi River, about two blocks farther north. The two south tracks are the tracks of appellant, and adjoin the north side of 4th Avenue, being separated therefrom by an iron fence, except at the street crossings. The south track is the east bound main track, and one next to it on the north is the west bound main track. The other seven tracks are those of the Chicago, Burlington and Quincy Railroad. 4th Avenue is the dividing line between the business district of the city, on the south, and the industrial district, on the north. Stores and business houses occupy the south side of 4th avenue,

of due care and caution as previously pleaded. The claim of appellant is untenable. There can be no contributory negligence, in contemplation of law, when there is an exercise of reasonable care. (Pierce and Pryce Street Railway Co. v. Fraker, 72 Ill. App. 600; North Chicago Street Railway Co. v. Ziegler, 151 Ill. 548, 549.) Therefore, the issue already joined by the allegation in the complaint of due care and a traverse thereof, embraced the question of contributory negligence. Alleging contributory negligence as an affirmative defense and the burden of proving it upon the defendant, but the plaintiff could not be placed in default by failing to specifically deny such a fact which already in an issue already joined. The reply was sufficient.

On the ground that the evidence and the pleadings were not guilty of any actionable negligence, but that the accident was not in the exercise of due care and in spite of contributory negligence, it is urged that the trial court erred in refusing to give the peremptory instruction asked by appellants at the close of the testimony for appellee and at the close of all the testimony, and in refusing to allow appellants' motion for judgment non obstante veredicto. The testimony shows the following facts: 18th Street in the City of Moline runs north and south across 4th Avenue, on east and west throughfare, and on across the railroad tracks lying north of 4th Avenue, to the Mississippi River, on the block north of 4th. The two south tracks are the tracks of appellant, and both in the middle of 4th Avenue, being separated therefrom by an iron fence, except at the street crossings. The south track is the main track, and one next to it on the north is the main bound main track. The other seven tracks are those of the Orion, Davenport and Quincy Railroad. 4th Avenue is the dividing line between the business district of the city, on the south, and the industrial district, on the north. Stores and business houses occupy the south side of 4th Avenue,

there being brick buildings on the south-east and the south-west corners of the intersection with 15th Street. Across the railroad tracks, are several large factories. The streets are designated by numbers, from west to east, and the avenues by numbers, from north to south. Watchmen's shanties are located on the north side of appellants' tracks, west of the street line, at 14th and 15th Streets, and on the south side of the tracks, east of the street line, at 16th Street Appellants' passenger station is located at 18th Street and the train involved in the accident was scheduled to stop there. The last previous stop was at Rock Island, two miles west, and the train left there two minutes late.

By an arrangement between the city of Moline and the two railroads, a watchman was stationed at the 15th Street crossing from 6:30 o'clock, A. M. to midnight each day. There were no gates, flasher signals or other mechanical devices, and no stop sign against north and south traffic, but there was a stop sign on the east side of 15th Street against west bound 4th Avenue traffic. South of the tracks on a post about three feet east of the street line was a rectangular metal sign about 2½ by 3½ feet in size, reading in large letters: "Watchman Off Duty", which, when a watchman was on duty, was customarily covered with another sign, reading "Rock Island". It is about forty eight feet from the south line of 4th Avenue to the center of appellants' east bound track. West of 15th Street the tracks curve to the north, and are visible for 1200 to 1500 feet from that street. An apparently disinterested witness testified that between 6:15 and 6:30 A. M. the street crossing is normally rather busy, with traffic going to the factories to work, including pedestrians and passenger cars, and was of an average on the morning of the accident; and that there is continuous traffic over the crossing all day long and it is about one of the busiest in Moline.

there being brick buildings on the south-east and the south-west corners of the intersection with 16th Street. Across the railroad tracks, are several large factories. The streets are designated by numbers, from west to east, and the avenues by numbers, from north to south. Watchman's shanties are located on the north side of Appellants' tracks, west of the street line, at 14th and 15th Streets, and on the south side of the tracks, east of the street line, at 16th Street. Appellants' passenger station is located at 18th Street and the train involved in the accident was scheduled to stop there. The last previous stop was at Rock Island, two miles west, and the train left there two minutes late.

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It had been sleeting and the ground was lightly covered with the frozen sleet, but it was not storming at the time of the accident. It was neither very light or very dark, and the witnesses testified the visability was good for two blocks or more. The train crew testified the whistle was repeatedly sounded and the bell was ringing continuously since they left Rock Island, and that two headlights, one of them the revolving type, were lighted.

The train was proceeding east on the most southerly track, and the milk truck came north on 15th Street from between the buildings on the south side of 4th Avenue. South of that point the driver's view to the east and to the west along the railroad tracks was completely obscured. One witness testified the truck was travelling at a very moderate rate of speed because it was a bad morning and estimated the speed at ten to twelve miles per hour. Another witness, who testified he did not see the milk truck until after the accident, also said that he did not read, but just glanced over a statement signed by him, prepared and written by an adjuster for appellants, and that he did not to his knowledge state to the adjuster that the truck was travelling fifteen to twenty miles per hour, as recited in the written statement. Another witness testified the truck was travelling at a normal rate of speed and explained the term as meaning that the condition of the streets has something to do with normal rate of speed, and the condition of the streets that morning were unfavorable to driving.

The engineer of the train testified that to reduce speed so as to make a proper stop at Moline he first applied the brakes about 12th Street, reducing the speed from 45 to 30 miles per hour, and made an emergency application of the brakes just before he struck the truck; that he first saw the truck when the locomotive was from 50 to 75 feet from the crossing, and that it came from between the buildings on 15th

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The train was proceeding east on the most southerly track, and the milk truck came north on 18th Street from between the buildings on the south side of 4th Avenue. South of that point the driver's view to the east and to the west along the railroad tracks was completely obscured. One witness testified the truck was travelling at a very moderate rate of speed because it was a bad morning and estimated the speed at ten to twelve miles per hour. Another witness, who testified he did not see the milk truck until after the accident, also said that he did not read, but just glanced over a statement signed by him, prepared and written by an adjuster for appellants, and that he did not to his knowledge state to the adjuster that the truck was travelling fifteen to twenty miles per hour, as recited in the written statement. Another witness testified the truck was travelling at a normal rate of speed and explained the term as meaning that the condition of the streets has something to do with normal rate of speed, and the condition of the streets that morning were unfavorable to driving.

The engineer of the train testified that to reduce speed so as to make a proper stop at Moline he first applied the brakes south 18th Street, reducing the speed from 45 to 30 miles per hour, and made an emergency application of the brakes just before he struck the truck; that he first saw the truck when the locomotive was from 50 to 75 feet from the crossing, and that it came from between the buildings on 18th

Street; that he was not able to judge its speed, but would guess it at 40 miles per hour. The watchman at 14th Street estimated the speed of the train at 35 miles per hour at that point. The conductor testified they were running from 45 to 50 miles per hour after they passed the Harvester works leaving Rock Island, and were practically running that fast as they approached the 15th Street crossing, and that the brakes went on suddenly, the first application cutting the speed about 15 miles per hour, before which they were going about 50 miles per hour, and that when the emergency application of the brakes was made the train slid on until it stopped. The locomotive stopped at 16th Street, and as a result of the sliding the train had several flat wheels. The engineer testified that at a speed of 35 miles per hour it could have been stopped within 200 feet. The truck was demolished, with parts of it strewed along the railroad, some of the parts going over the fence onto 4th Avenue, and the body of the decedent was found on the west bound track some distance east of 15th Street. The post on which the sign "Watchman OffDuty" was fastened, was broken off, and with the sign, was found in 4th Avenue. Decedent's brother, who was driving another milk truck on 7th Street at the time, close to appellants' tracks, testified the train was running at a speed of from 50 to 55 miles per hour at that point, which is about one half mile from the place of the accident. A motion to strike his testimony on the ground that it was too remote from the scene of the accident was denied.

There were skid marks of the truck in the sleet, extending from the south line of 4th Avenue to the track where it was struck by the train. The crossing watchman, who had come to the crossing at about 6:15 or 6:18 A. M., testified that the truck stopped, or almost stopped, about 4 or 5 feet from the track and then seemed to slide and skidded onto and came to a stop on the track. He also testified

street; that he was not able to judge its speed, but would guess it at 40 miles per hour. The watchman at 14th Street estimated the speed of the train at 35 miles per hour at that point. The conductor testified they were running from 45 to 50 miles per hour at the time they passed the Harvester works leaving Rock Island, and were gradually running that fast as they approached the 18th Street crossing, and that the brakes went on suddenly, the first application cutting the speed about 15 miles per hour, before which they were going about 5 miles per hour, and that when the emergency application of the brakes was made the train slid on until it stopped. The locomotive stopped at 18th Street, and as a result of the sliding the train had several flat wheels. The engineer testified that at a speed of 35 miles per hour it could have been stopped within 300 feet. The truck was demolished, with parts of it strewed along the railroad, some of the parts going over the fence onto 4th Avenue, and the body of the deceased was found on the west bound track some distance east of 18th Street. The post on which the sign "Watchman Officer" was fastened, was broken off, and with the sign, was found in 4th avenue. Decedent's brother, who was driving another milk truck on 7th Street at the time, close to appellants' tracks, testified the train was running at a speed of from 50 to 55 miles per hour at that point, which is about one half mile from the place of the accident. A motion to strike his testimony on the ground that it was too remote from the scene of the accident was denied.

There were skid marks of the truck on the street, commencing from the south line of 4th Avenue to the track where it was struck by the train. The crossing watchman, who had come to the crossing about 8:15 or 8:18 A. M., testified that the truck stopped, or almost stopped, about 4 or 5 feet from the track and then started [illegible] and skidded onto and came to a stop on the track. [illegible] testified

that the windows on the east side of the truck, and as much of the windshield as he saw, were covered with frozen sleet, frosted over, but he did not testify what part of the windshield he saw, or that the other part of it or the other windows of the truck were not clear. None of the other witnesses to the accident testified to seeing any such condition of the windows as testified to by the watchman. He also testified he saw the head light of the train coming at about 12th Street.

Hugo Clausen, a workman at one of the factories, testified that at about 6:20 A. M. he saw the 15th Street crossing watchman covering the "Watchman Off Duty" sign, on the north side of the tracks, with the other sign mentioned, but did not see him do anything with the sign on the south side of the tracks, and that he had seen the watchman move the signs before 6:30 A.M. on previous occasions. Appellants criticize this testimony as false because there was no sign on the north side of the tracks, the watchman's shanty being located there. This testimony was three years, lacking eleven days, after the accident. The witness was apparently disinterested, and it might be that his confusion as to the location of the sign, and the exact wording thereof, was because of the lapse of time. The watchman denied that he changed the signs, and testified that the sign used for covering was hanging on the fence, resting on the ground; that he never went on duty before 6:30 A.M., but admitted he sometimes came earlier to change clothes and get ready for the day.

The witness Clausen further testified that immediately after the accident the watchman asked the conductor what time it was, and upon a reply that it was 6:27 A. M. said: "That releases me from duty"; that the witness then asked him: "How come you are changing those signs if you are not on duty?", and that the watchman was

that the windows on the east side of the truck, and a much of the windshield as he saw, were covered with frozen sleet, frosted over, but he did not testify what part of the windshield he saw, or that the other part of it or the other windows of the truck were not clear. None of the other witnesses to the accident testified to seeing any such condition of the windows as testified to by the watchman. He also testified as to the red light of the train coming at about 14th Street.

Hugo Olsen, a workman on one of the factories, testified that at about 8:30 A. M. he saw the 14th Street crossing watchman covering the "Watchman Off Duty" sign, on the north side of the tracks, with the other sign. Witness, but did not see him do anything with the sign on the south side of the tracks, and that he had seen the watchman move the signs before 8:30 A.M. on previous occasions. Appellants criticize this testimony as there became there was no sign on the north side of the tracks, the watchman's absence being located there. This testimony was three years old, looking eleven days after the accident. The witness was not merely disinterested, and it might be that his confusion as to the location of the sign, and the exact working thereof, was because of the lapse of time. The watchman denied that he changed the signs, and testified that the sign used for covering was hanging on the fence, leaning on the ground; that he never left on duty before 8:30 A.M., but sometimes be sometimes came earlier to change clothes and get ready for the day.

The witness Olsen further testified that the sleet, left on the accident the watchman asked the conductor what time it was, and upon a reply that it was 8:17 A. M. said. "Then I have an hour off duty"; that the witness then asked him: "Do you have to be changing those signs if you are not on duty?", and that the watchman

"pretty shaky" and walked away. The watchman denied this testimony but the conductor did not testify thereto. While two other witnesses testified they saw the sign and that it was not covered, neither of them placed the time as at or after the time testified to by Clausen.

The well settled rule of law is that when there is a conflict in the material testimony, the issues must be submitted to the jury, and it is only when the testimony, taken in its aspect most favorable to the plaintiff, does not establish a cause of action, that the court is justified in directing a verdict for the defendant, or in entering a judgment non obstante veredicto. (Illinois Central Railroad Co. v. Bailey, 222 Ill. 480; City of Chicago v. Jarvis, 226 id. 614; Froehler v. North American Life Insurance Company of Chicago, 374 Ill. 17; Walaite v. Chicago, Rock Island and Pacific Railway Co., 376 id. 59.) The trial court correctly denied the motions of appellants for a directed verdict and for judgment non obstante veredicto.

In the case at bar the testimony shows that the decedent, travelling at a low rate of speed because of the condition of the street, applied his brakes as soon as he passed the corner drug store, beyond which, to the south, his view to the east and to the west, was completely obscured by the buildings on each side of 15th Street, and that his car slid onto the track from that point. He was struck by a train which the jury were justified in believing was travelling at a speed of from 45 to 50 miles an hour through the closely built up business section of the city, across one of the busiest streets, with heavy traffic at that hour of the day, where no sign of warning was maintained except a watchman at certain hours, and when the scheduled time of his duty had not yet arrived, and there was testimony, which, if true, showed the warning sign had been covered, indicating to the

[illegible]

[illegible] but to [illegible] witnesses testified the [illegible] neither of them placed the [illegible] by [illegible].

The well [illegible] in the [illegible] and it is only when [illegible] able to the jury [illegible] the court is justified in directing [illegible] in an trying [illegible] Railroad Co. v. [illegible] id. 614; Procedure [illegible] 374 Ill. 17; [illegible] 376 id. 54. The [illegible] ente for a directed [illegible]

In the case [illegible] ling at a low rate of speed [illegible] supplied the [illegible] yond which, [illegible] completely occupied [illegible] that his car did not [illegible] train which the jury [illegible] speed of from 40 to 50 [illegible] business section of the city, [illegible] heavy traffic [illegible] maintained [illegible] time of his duty had not [illegible] if true, showed [illegible]

decedent that the crossing was clear.

While the decedent was acquainted with the crossing, having used it for some months, and under the law was bound to approach it with the care and caution commensurate with the known danger, and a failure to do so is condemned as negligence, (Grubb v. Illinois Terminal Co., 366 Ill. 330, 337; Greenwald v. Baltimore and Ohio Railroad Co., 332 id. 627), the testimony in this case shows that the decedent was observing that rule of law. It is also the rule of law, that even though no statute or ordinance requires any particular means of crossing protection, a railroad company is not relieved from providing such protection as public safety or common prudence requires, particularly where, as in this case, the crossing is dangerous, as must have been known to appellants. (Wagner v. Toledo, Peoria and Western Railroad Co., 352 Ill. 85; Willett v. Baltimore and Ohio Southwestern Railroad Co., 284 Ill. App. 307.)

Among the charges of negligence alleged against appellants by the amended complaint are the charges of operating the train across unguarded crossings in the business district of the city at a high, dangerous, excessive, and unreasonable rate of speed; permitting such crossings to be unguarded although great numbers of pedestrians and motor vehicles regularly used such crossings; failure to have the train under such control that it could be stopped within a reasonable distance after danger of collision became apparent, or the speed reduced sufficiently to reduce the force and effect of such collision; and otherwise so negligently controlled and operated the train as to cause the injury to and death of the plaintiff's intestate. The evidence was sufficient to justify the jury in finding that the decedent was in the exercise of due care at and immediately before the accident, and that appellants, by their servants, were guilty of the negligence

[illegible] accident that he [illegible] the [illegible].

While the accident was [illegible] used it for some months, [illegible] it with [illegible] a failure to do so is contrary [illegible] Terminal Co., 366 Ill. 330, 337; [illegible] Railroad Co., 326 Ill. 67), the [illegible] the accident [illegible] law, that even though no [illegible] mere means of [illegible] from providing such [illegible] requires, [illegible] one, as [illegible] and Western Railroad Co., 302 Ill. 89; [illegible] Southwestern Railroad Co., 264 Ill. [illegible] 2 C.).

Among the other [illegible] the amended complaint [illegible] unguarded crossing, in [illegible] dangerous, [illegible] crossing to be unguarded [illegible] motor vehicles [illegible] train under such [illegible] distance after danger of [illegible] reduced sufficiently [illegible] and [illegible] cause the injury [illegible] dence was sufficient [illegible] was in the exercise [illegible] and that [illegible]

charged, and which was the proximate cause of decedent's injury and death.

Inasmuch as appellants introduced testimony as to the speed of the train at points more remote than that testified to by the decedent's brother, they are in no position to complain of the error, if any, in admitting his testimony.

The evidence shows that the decedent was twenty one years old, and had several brothers and sisters, and habitually contributed to the support of his parents. There is no room in such a case to say the verdict was excessive.

The fifth given instruction told the jury that "if from all the evidence in the case you believe that the defendants at and immediately before the time complained of in plaintiff's complaint failed to exercise ordinary care and prudence, and that as a proximate result of said failure to exercise such ordinary care and prudence at the time and place complained of the plaintiff's intestate sustained injuries from which he later died, as in the plaintiff's complaint alleged", etc. The claim that the instruction does not limit the negligence to that charged in the complaint is hypercritical and without merit. A fair reading of it does not support appellants' contention and nobody of ordinary intelligence would so understand it.

Appellants offered forty instructions, of which the court gave seventeen. The substance of the refused instructions was all covered by given instructions. Some of the refused instructions were long and involved, and more likely to be a source of confusion to the jury rather than of instruction. The practice of asking an unreasonably large number of instructions has been frequently condemned. (City of Salem v. Webster, 192 Ill. 369, 374; Gregory v. Richey, 307 id. 219, 231 232).

charged, and which was a proximate cause of decedent's injury and death.

Inasmuch as appellees introduced testimony to show that one of the trains at points more remote than the distance testified to by decedent's brother, they are in no position to complain of error, if any, in admitting the testimony.

The evidence shows that the decedent [illegible] and had several breathing and airplane, and [illegible] the support of his presence. There is no [illegible] the verdict was excessive.

The fifth given instruction [illegible] jury that in from the evidence [illegible] believe that [illegible] carefully before the time complained of in plaintiff's complaint failed to exercise ordinary care and prudence, and that [illegible] maximum results of said failure to exercise such ordinary care [illegible] time and place complained of in plaintiff's complaint [illegible] from which he later died, and in the plaintiff's complaint filed, etc. The objection that the instruction [illegible] the negligence to that alleged in the complaint is by [illegible] without merit. A fair reading of it does not [illegible] body of ordinary intelligence could be misunderstand it.

Appellants offered [illegible] seventeen. The subject-matter of [illegible] covered by given instructions. [illegible] involved, and more likely to [illegible] rather than of instruction. [illegible] large number of instructions [illegible] (Vol. [illegible] Salem v. Sebelen, 136 Ill. 386, 396; Gregory v. Hickey, 217 Ill. 218, 221, 222).

Early in their reply brief, counsel for appellants say, "we intend herein to point out the unfair, unwarranted and absolute false, unjust and dishonest interpretation which appellee's counsel, in his zeal to support his judgment, has put upon important phases of the testimony." Such an assault upon appellee's counsel is without justification and deserves severe censure. The reply brief would have been stricken had an appropriate motion been made.

Finding no reversible error in the record, the judgment of the circuit court is affirmed.

Judgment affirmed.

Briefly in their reply brief, counsel [illegible] "We intend herein to point out the unfair, unwarranted and absolute false, unjust and biased or interpretation [illegible] appellee's counsel, in his zeal to convert the judgment, [illegible] upon important phases of the testimony." [illegible] appellee's counsel is [illegible] (insufficient [illegible]) serves severe censure. The reply brief would give [illegible] had an appropriate notice been made.

Finding no reversible error [illegible], the judgment of the circuit court is affirmed.

Judgment affirmed.

42449

321 I.A. 298

J. L. OAKES, Jr.,
Appellee,

v.

CHICAGO FIRE BRICK COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In November 1939 plaintiff filed his third amended complaint (hereinafter referred to as the complaint) in the Superior court to recover damages for the wrongful termination at the end of one month of an oral agreement alleged to have been made in March 1937 in the state of Pennsylvania, which does not prohibit oral contracts to be performed within a year, whereby he was employed as sales manager for a period of one year at a stipulated salary of $6,000, payable in monthly installments of $500. Plaintiff appealed from an order sustaining defendant's motion to strike the complaint and dismissing the suit on the sole ground that the alleged agreement sued upon was barred by the Illinois Statute of Frauds (Ill. Rev. Stat. 1943, ch. 59, par. 1.) In an opinion filed in July 1941 (Oakes v. Chicago Fire Brick Company, 311 Ill. App. 111) we reversed the order dismissing the complaint and remanded the cause with directions to overrule the motion, require defendant to plead and to proceed with the trial upon its merits. After the cause was reinstated and redocketed trial by jury on the merits first resulted in a disagreement and a second trial in a verdict and judgment in favor of plaintiff for $6,347, from which defendant has taken an appeal.

Of the six points raised in defendant's brief, the first three are a reargument of the sole question presented on the former appeal, namely, whether plaintiff's suit was barred by the Illinois Statute of Frauds. Having fully considered and determined the question in our former opinion, that

42449

J. L. OAKES, Jr.,
Appellee,

v.

CHICAGO FIRE BRICK COMPANY,
a corporation,
Appellant.

MR. PRESIDING JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT:

In November 1939 plaintiff filed his third amended complaint (hereinafter referred to as the complaint) in the superior court to recover damages for the wrongful termination at the end of one month of an oral agreement alleged to have been made in March 1937 in the state of Pennsylvania, which does not prohibit oral contracts to be performed within a year, whereby he was employed as sales manager for a period of one year at a stipulated salary of $6,000, payable in monthly installments of $500. Plaintiff appealed from an order sustaining defendant's motion to strike the complaint and dismissing the suit on the sole ground that the alleged agreement sued upon was barred by the Illinois Statute of Frauds (Ill. Rev. Stat. 1943, ch. 59, par. 1.). In an opinion filed in July 1941 (Oakes v. Chicago Fire Brick Company, 311 Ill. App. 111) we reversed the order dismissing the complaint and remanded the cause with directions to overrule the motion, require defendant to plead and to proceed with the trial upon its merits. After the cause was reinstated and a bifurcated trial by jury on the merits first resulted in a disagreement and a second trial in a verdict and judgment in favor of plaintiff for $6,347, from which defendant has taken an appeal.

Of the six points raised in defendant's brief, the first three are a rearrangement of the self-preservation presented on the former appeal, namely, whether plaintiff's suit was barred by the Illinois Statute of Frauds. Having fully considered and determined the question in our former opinion, that

decision is binding on both parties as well as the court, and will not again be considered. People v. Militzer, 301 Ill. 284; Adam v. Columbian National Life Insurance Company, 218 Ill. App. 54; Anderson v. Fletcher, 228 Ill. App. 372; Trego v. Rubovits, 228 Ill. App. 559.

As other ground for reversal it is urged that the verdict and judgment are contrary to the manifest weight of the evidence in that there is a failure of proof that the alleged contract was ever in fact entered into and that all the evidence adduced by both plaintiff and defendant does not prove the allegations of the complaint. Reduced to more specific terms, defendant's contention is that the parties never made a final agreement as to (a) the term or length of employment; (b) the amount of compensation; or (c) the character of employment; and that plaintiff's failure to prove that he was wrongfully discharged required a directed verdict. This necessitates an examination of the evidence, embracing a record of over 500 pages.

The final negotiations for the alleged oral agreement were carried on with William J. Gilbert, president of the defendant corporation. Plaintiff first met him in January 1937, pursuant to an appointment made by D. D. Davis, Gilbert's associate in business. Plaintiff had been recommended to Davis by one Ledogar of Cleveland, Ohio. Plaintiff testified at length that Gilbert told him the fire brick company had a good business and had earned considerable money, "but of late and for some time had been going downhill. *** we just don't seem to be able to get ourselves organized here from a sales angle in the last few years. What we need is someone to show us how to go about doing this and he asked me my thoughts and theories as to what I considered as essential for sound

decision is binding on both [illegible] will not again be considered. [illegible] Adam v. Columbian National Life Insurance Company, [illegible] 74; Anderson v. Metcalfe, 228 Ill. [illegible] Trano v. Cevalie, 228 Ill. App. 539.

As other grounds for reversal [illegible] the verdict and judgment are contrary to the manifest weight of the evidence in that there is a failure of proof [illegible] alleged contract was ever in fact entered [illegible] the evidence adduced by both plaintiff and defendant [illegible] the allegations of the complaint. [illegible] specific terms, defendant's contention is that the parties never made a final agreement as to (a) the term or length of employment; (b) the amount of compensation; or (c) the character of employment; and that plaintiff's failure to prove that he was wrongfully discharged required a directed verdict. This necessitates an examination of the evidence, embracing a record of over 500 pages.

The final negotiations for the alleged oral agreement were carried on with William A. Hilbert, president of the defendant corporation. Plaintiff first met him in [illegible], 1932, pursuant to an appointment made by [illegible] Davis, Hilbert's associate in business. Plaintiff was [illegible] by one Ledger of Cleveland, Ohio. [illegible] length that Gilbert told him the firm [illegible] good business and had earned considerable [illegible] and for some time had been going downhill. [illegible] seem to be able to get ourselves organized [illegible] angle in the last few years. [illegible] us how to go about doing this [illegible] theories as to what [illegible]

selling." Plaintiff replied by discussing his theory of sales principles and psychology, and the necessity of thoroughly training and schooling salesmen before allowing them to contact customers; also the importance of instilling them with confidence in the merits of their product and giving them the full cooperation of the firm. He told Gilbert that he "had heard fine things about Mr. Davis," and would like to become associated with a firm in which he was interested, but that he did not know whether he would like the fire-brick business and wanted to check into it further; that he had a position and a contract with the Lowell Air Conditioning Company, drawing $100 a week, plus traveling expenses, and an interest in the firm, which did not terminate until December 1937, and if he made a change he would naturally want larger compensation than he was then receiving; that he would not consider other employment unless he got at least $6,000 a year and a permanent position. "I just don't simply want a job, I want a job where I have a definite interest in the company, a stock interest or some such setup along those lines." He said that Mr. Gilbert replied, "Well, now, that's the way I like to hear a man talk. We don't want anybody just to come in here for awhile, that's the way I want a man to feel, make this his life work and have an interest in the company." At a subsequent conference on February 16 in Chicago Gilbert and Davis interrogated plaintiff as to his background and whether he thought he could "get this sales organization properly organized and get us some volume of business," to which plaintiff replied, "Yes, I firmly believed I could. It will require some time, I don't have a magic wand, those things cannot be accomplished overnight, but I firmly believe it can be done." Plaintiff stated that in the course of the conversation Davis turned to Gilbert and said "It looks like Mr. Oakes is the man we want, Mr. Gilbert," and Mr. Gilbert

selling." Plaintiff replied by discussing the theory of sales principles and psychology, the necessity of thoroughly training and schooling salesmen before allowing them to contact customers; also the importance of instilling them with confidence in the merits of their product and giving them the full cooperation of the firm. He told Gilbert that he "had learned from talking about Mr. Davis," and would like to become associated with a firm in which he was interested, but that he did not know whether he would like the fire-brick business and wanted to check into it further; that he had a position and a contract with the Lowell Air Conditioning Company, drawing $120 a week, plus traveling expenses, and an interest in the firm, which did not terminate until December 1937, and if he made a change he could naturally want larger compensation than he was then receiving; that he would not consider other employment unless he got at least $6,000 a year and a permanent position. "I just don't simply want a job, I want a job where I have a definite interest in the company, a stock interest or some such arrangement along those lines." He said that Mr. Gilbert replied, "Well, now, that's the way I like to hear a man talk. We don't want anybody just to come in here for awhile, that's the way I want a man to feel, make this his life work and have an interest in the company." At a subsequent conference on "January 15 in Chicago Gilbert and Davis interrogated Plaintiff as to his background and whether he thought he could "get this all a organization properly organized and get us some volume of business," to which plaintiff replied, "Yes, I firmly believed I could. It will require some time, I don't know a single week, those things cannot be accomplished overnight, but I firmly believe it can be done." Plaintiff also stated in the course of the conversation Davis turned to Gilbert and said "It looks like Mr. Oakes is the man we want, Mr. Gilbert," and Mr. Gilbert

said "Well now, wait a minute. This is a very important move to us now, we want to be very sure that we have got the right man. Let's you and I discuss this a bit further before we come to a decision." Gilbert then suggested that he would like to have plaintiff send a list of references and added, "This means quite a bit to us and we want to make sure we are not making any mistake. If you will send us a list of references and a brief sketch of your background then I will get in touch with you in another week or ten days as soon as I have had an opportunity to check into you thoroughly." The matter of compensation was also discussed at that meeting. Plaintiff said that he reiterated his previous statement that he would have to have a minimum of $6,000 inasmuch as he was making $5,200 a year beside having an interest in the business in his present employment, and that Mr. Davis said "Well, that can be worked out, I am sure, that is the way we would like a man to come in here, so that he would have something more at stake than just simply a job," and Mr. Gilbert added that was the way he felt about it too. Thereafter plaintiff typed off some facts pertaining to his education, former employment and experience and a long list of references, which were introduced in evidence. From that memorandum it appears that plaintiff had completed his study of law at the University of Illinois, had then become associated with the Postage Meter Company, first as salesman, then as district manager, in charge of parts of Illinois, Iowa and Indiana, and later in charge of the State of Ohio from 1923 to 1930; that in 1930 he became a partner of Ledogar and Company, members of the Cleveland Stock Exchange, with whom he was associated until January 1936; and since 1936 he had been associated with and interested in Lowell Air Conditioning Corporation as vice president and sales manager.

Following these conferences, plaintiff received a letter from Gilbert in the early part of March 1937, making

said "Well now, wait a minute. This is very important move to us now, we want to be very sure that we have got the right man. Let's you and I discuss this a bit further before we come to a decision." Gilbert then suggested that he would like to have plaintiff send a list of references and said, "This means quite a bit to us and we want to make sure we are not making any mistake. If you will send me a list of references and a brief sketch of your background then I will get in touch with you in another week or ten days as soon as I have had an opportunity to check into you thoroughly." The matter of compensation was also discussed at that meeting. Plaintiff said that he reiterated his previous statement that he would have to have a minimum of $6,000 insured as he was making $5,000 a year besides having an interest in the business in his present employment, and that Mr. Davis said "Well, that can be worked out, I am sure, that is the way we would like a man to come in here, so that he would have something more to think than just simply a job," and Mr. Gilbert added that the way he felt about it too. Thereafter plaintiff typed out a complete certaining to his education, former employment and references and a long list of references, which were introduced in evidence. From that memorandum it appears that plaintiff had completed his study of law at the University of Illinois, and then became associated with the Mortage Guaranty Company, first as salesman, then as district manager, in charge of parts of Illinois, Iowa and Indiana, and later in charge of the state of Ohio from 1928 to 1930; that in 1930 he became a partner of Sampson and Company, members of the Cleveland Stock Exchange, with which he was associated until January 1,1934; and since 1934 he has been associated with and interested in Lowell, Inc. and Standard Corporation as vice president and sales manager.

Following these conferences, plaintiff received a letter from Gilbert in the early part of March 1937, stating

an appointment for a further meeting in Philadelphia March 8. In that letter he stated: "Have decided that we may desire to spend considerable time with each other, and accordingly, will meet you at your office at 9:00 A. M. next Monday." Gilbert arrived at plaintiff's office in Philadelphia at 9:00 A. M. on that date, and in view of Gilbert's expressed desire to spend considerable time with him and in order to avoid interruptions, plaintiff suggested that they go to his apartment for lunch, and there "discuss our situation." This was the meeting at which the oral agreement is alleged to have been consummated. Gilbert stated that the fire brick business had great potentialities and afforded "a wonderful opportunity for a young man like you. We have fine products. I know the products are good, the only thing is we just simply don't seem to be able to sell them; we don't know why; we haven't got our sales organization or sales force properly organized to sell these things. *** But what we need is somebody like yourself that can show us how to sell them. Now, we have come to the conclusion that we want your services. I said, Fine. I said, What are your thoughts on a salary? Is $6,000 a year agreeable to you? He says, Yes, $6,000 is agreeable to us, and I says, Well, now, how about a contract on that. He says Now, wait a minute Mr. Oakes. We can't give you, you know, a 5 or 10 year contract on this, and I says, Well now, I don't want a 5 or 10 year contract but I do have to have an agreement with a minimum of a year because otherwise I could not possibly afford to move my furniture, break up my home here, and go to the expense of moving to Chicago and take my children out of school or boarding them at school and moving to Chicago, unless I would at least be guaranteed a year's salary because I have already with the Lowell Air Conditioning Co. a contract that doesn't terminate until December of this year, which still has ten months to run, so I would have to have a minimum. Well, he says, that is agreed upon. We will

an appointment for a further meeting, [illegible] 6. In that letter he stated: "Have [illegible] we may [illegible] to spend considerable time with each other, [illegible], [illegible] meet you at your office at 9:00 [illegible] next [illegible]." Gilbert arrived at plaintiff's office in [illegible] on that date, and in view of Gilbert's expressed desire [illegible] time with him and in order to avoid interruptions, plaintiff suggested that they go to his apartment for lunch, and there "discuss our situation." This was the meeting at which the oral agreement is alleged to have been consummated. Gilbert testified that the fire brick business had great potentialities [illegible] afforded "a wonderful opportunity for a young man like you. We have fine products. I know the products are good, the only thing is we just simply don't seem to be able to sell them; we don't know why; we haven't got our sales organization or sales force properly organized to sell these things. [illegible] what we need is somebody like yourself that can show us how to sell them. Now, we have come to the conclusion that [illegible] your services. I said, Fine. I said, what are your thoughts on a salary? He $6,000 a year agreeable to you? He says, Yes, $6,000 is agreeable to us, and I says, Well, now, how about a contract on that. He says Now, wait a minute Mr. Odell. [illegible] you, you know, a 5 or 10 year contract on this, and [illegible] now, I don't want a 5 or 10 year contract but I [illegible] an agreement with a minimum of a year because [illegible] not possibly afford to move my family, [illegible] here, and go to the expense of moving to Chicago [illegible] children out of school or [illegible] to Chicago, unless I would at least be guaranteed [illegible] salary because I have already with the [illegible] Co. a contract that doesn't terminate until [illegible] year, which still has ten months to run, so I would have to have a minimum. Well, he says, that is agreed upon. We will

agree to that, and he says In that length of time, he says, it will give you a chance to see whether you like the fire brick business and it will give us a chance to see whether we like you. So we shook hands. Previously to shaking hands Mr. Gilbert said, That is agreed on. Then I said to Mr. Gilbert, I said, Now how about the stock situation, what are your thoughts on that. He said, Well, what are your thoughts, what do you think it ought to be. I says, Well, I think it should be - here is a business that is not doing - not making money; it has been going downhill; and if I can come in there and so organize your sales force so as to make money for you and Mr. Davis I am entitled to part - if I cut wood with you, I want part of the wood, and I feel that I am entitled to more than just simply a salary, so I think it should be a third to you and a third to Mr. Davis and a third to me." A plan was then suggested by plaintiff for acquiring an interest in the stock, but Gilbert thought there would be plenty of time to consider that later and suggested that when they got to Chicago they could sit down with Mr. Davis "and the three of us will work out something, you will be satisfied, you will be happy, don't worry about that."

The only other person present at the conversation was a maid, Nannie Holmes, who was ironing in the next room of a small kitchenette, about 8 or 10 feet away. There was an opening between the living room and the kitchenette, and Nannie testified that she overheard the conversation between plaintiff and Gilbert, who were facing her in the next room They talked about an hour and a half, during which she did not leave her ironing at any time. Nannie Holmes had an educational background of one year at Normal school or college, and, at the time she testified, was employed as a chambermaid and waitress at Bryn Mawr College, near Philadelphia. She had worked for

agree to that, and he says in that length of time, he says, it will give you a chance to see whether you like the brick business and it will give us a chance to see whether we like you. So we shook hands. Previously to that, James Mr. Gilbert said, "That is agreed on." Then I said to Mr. Gilbert, I said, "Now how about the stock situation, what are your thoughts on that." He said, "Well, what are your thoughts, what do you think it ought to be." I says, "Well, I think it should be - here is a business that is not doing - not making money; it has been going downhill; and if I can come in there and so organize your sales force so as to make money for you and Mr. Davis I am entitled to part - if I cut wood with you, I want part of the wood, and I feel that I am entitled to more than just simply a salary, so I think it should be a third to you and a third to Mr. Davis and a third to me." A plan was then suggested by plaintiff for acquiring an interest in the stock, but Gilbert thought there would be plenty of time to consider that later and suggested that when they got to Chicago they could sit down with Mr. Davis and the three of us will work out something, you will be satisfied, you will be happy, don't worry about that."

The only other person present at the conversation was a maid, Bannie Holmes, who was ironing in the next room of a small kitchenette, about 3 or 10 feet away. There was an opening between the living room and the kitchenette, and Bannie testified that she overheard the conversation between plaintiff and Gilbert, who were seating her in the next room. They talked about an hour and a half, during which she did not leave her ironing at any time. Bannie Holmes has an elementary school background of one year at Normal school or college, and at the time she testified, was employed as a chambermaid and waitress at Bryn Mawr College, near Philadelphia. She had worked for

plaintiff at Haverford, Pennsylvania from November 1936 to March 1937, and until he broke up his home and moved to Chicago. She corroborated plaintiff's testimony with respect to the conversation that took place that morning, and especially in the following respects. She said that Gilbert told Oakes "I believe that you will be the ideal man for this job." And when the money question arose Oakes said: "I will not go for less than $6000 a year, and on that I would have to have a contract. *** I will go for one year contract at $6000 per year, for this reason, I have a boy in school, a day student, and breaking up housekeeping and putting this boy in school, would be quite an expense," to which she said that Gilbert replied: "That is agreeable. I will give you $6000 a year and a one year contract. That will give you a chance to see how you like us and like the job, and we will see how we like you and your work." She likewise stated that Gilbert then said: "That is agreeable." And as he arose they shook hands. "After that Mr. Oakes spoke something about a bonus and shares, which I would not just exactly understand. Mr. Gilbert said: 'We will discuss that further, when we get to Chicago with Mr. Davis.'" On cross-examination the witness stated that plaintiff came to her house about six months after he left Haverford and asked her if she remembered anything that had been said, and without repeating what she had heard, she told him that she remembered the conversation. Otherwise, she had not spoken to anyone about it, except a Mr. Keele after she arrived in Chicago as a witness. (Mr. Keele was evidently one of plaintiff's attorneys.)

Gilbert on behalf of defendant, stated his interest in and connection with the Chicago Fire Brick Company, the character of its organization and of the products which it manufactured, how its sales force was organized, and then proceeded to a discussion of his first conference with Oakes in

plaintiff at Waverford, Pennsylvania from November 1935 to March 1937, and until he broke up his home and moved to Chicago. She corroborated plaintiff's testimony with respect to the conversation that took place that morning, and especially in the following respects. She said that Gilbert told Mr. Oakes "I believe that you will be the ideal man for this job." And when the money question arose Oakes said: "I will not go for less than $6000 a year, and on that I would have to have a contract. *** I will go for one year contract at $6000 per year, for this reason, I have a boy in school, a day student, and breaking up housekeeping and putting this boy in school, would be quite an expense," to which she said that Gilbert replied: "That is agreeable. I will give you $6000 a year and a one year contract. That will give you a chance to see how you like us and like the job, and we will see how we like you and your work." The witness stated that Gilbert then said: "That is agreeable." And as he arose they shook hands. "After that Mr. Oakes spoke something about a bonus and shares, which I would not just exactly understand. Mr. Gilbert said: 'We will discuss that further, when we get to Chicago with Mr. Davis.'" On cross-examination the witness stated that plaintiff came to her home about six months after he left Waverford and asked her if she remembered anything that had been said, and without repeating what she had heard, she told him that she remembered the conversation. Otherwise, she did not speak to anyone about it, except a Mr. Keele after she arrived in Chicago as a witness. (Mr. Keele was evidently one of plaintiff's attorneys.)

Gilbert on behalf of defendant, stated his interest in and connection with the Chicago Fire Prevention Company, the character of its organization and of the personnel, how it manufactured, how its sales force was organized, and then proceeded to a discussion of his visit from Mr. Oakes in

January 1937 at defendant's office where "we talked in a general way about our business, and he told me what he had done, gave me his past experience, and I told him that we were intensely interested in selling" a certain stucco product which was non-competitive and readily salable, for repairing the interior of old boilers in industrial heating plants. Gilbert denied that anything was said by him about the lack of sales management in either of the meetings, but emphasized the fact that during the second meeting "I accentuated this thermo stucco. I told him I was interested in talking with him about the sale of our super thermo stucco. I stated there was no chance to sell building material because the demand was at such a low ebb and the competition was so fierce, and that no matter what sales ability he had, it would be impossible to increase profitably our sale of building material, *** but I said 'Here is a chance to make sales on this thermo stucco,' and I told him of the wonderful results that we had had from its use. I think he mentioned something about wanting an interest in the business and a call on the stock or bonus out of the profits if he came to work for the company. It was mentioned incidentally and I did not pay much attention to it." Referring to the conversation of February 16 in the Chicago office of defendant when Davis was present, Gilbert said that "I told him we needed more sales. I did not tell him we needed a new head of the sales department or a new sales manager. We had a sales manager, Mr. Phelps, who was termed sales promotion manager, and as such he had charge of the salesmen. I did not need any new man to take Mr. Phelps' place. So at the meeting on February 16, in addition to going over Mr. Oakes' previous contacts, I told him that we would investigate his references and get in touch with him later." With respect to the meeting in Philadelphia March 8, 1937 where the oral agreement is alleged

January 1937 at defendant's office where we talked in a general way about our business, and he told me what he had done, gave me his past experience, and I told him that we were intensely interested in selling a certain electric product which was non-competitive and readily salable, for repainting the interior of old boilers in industrial heating plants. Gilbert denied that anything was said by him about the lack of sales management in either of the meetings, but emphasized the fact that during the second meeting "I accentuated this thermo stucco. I told him I was interested in talking with him about the sale of our super thermo stucco. I stated there was no chance to sell building material because the demand was at such a low ebb and the competition was so fierce, and that no matter what sales ability he had, it would be impossible to increase profitably our sale of building material, *** but I said 'there is a chance to make sales on this thermo stucco,' and I told him of the wonderful results that we had had from its use. I think he mentioned something about wanting an interest in the business and to call on the stock or bonus out of the profits if he came to work for the company. It was mentioned incidentally and I did not pay much attention to it." Referring to the conversation of February 16 in the Chicago office of defendant when Davis was present, Gilbert said that I told him we needed more sales. I did not tell him we needed a new head of the sales department or a new sales manager. We had a sales manager, Mr. Phelps, who was termed sales promotion manager, and as such he had charge of the salesmen. I did not mean any new man to take Mr. Phelps' place. At the meeting on February 16, in addition to going over Mr. Gilbert's previous contacts, I told him that we would investigate his references and get in touch with him later." With respect to the meeting in Philadelphia March 8, 1937 where the oral agreement is alleged

to have been consummated, Gilbert testified that he went out to plaintiff's apartment and that the maid Nannie Holmes was working about 20 to 25 feet away from them. "Eliminating all the preliminaries about his experience, etc., Mr. Oakes was continually talking about coming in as sales manager of the company, and I said: 'Mr. Oakes, that would be ridiculous, because you know nothing about the technical end of our products, and we couldn't put you in as sales manager over these men who have been with us so many years. Now I would suggest that you come with us as a salesman *** and, if you can demonstrate your ability to sell thermo stucco, then we will talk to you later about a job as sales manager.' Well he said, 'I can sell it, I can sell it.' *** On the question of pay for his services or length of time he was to work, he said he would have to have a salary of $500 a month on account of his son in college and moving expenses, and I told him, 'That is all right, that is satisfactory to us. We will try you out at $500 a month and let you see if you can - let you demonstrate your ability to sell this stucco.' He said he must have a one year contract. He said he ought to have a one year contract. I said we couldn't give him a one year contract and said, 'We have got to know that you can sell this thermo stucco. If you can demonstrate that you can sell it, we will then talk contract with you.'" On further interrogation by his counsel, Gilbert specifically denied that he had agreed to give plaintiff a one-year contract and to pay him $500 a month for one year.

It thus appears that the testimony of the respective parties is sharply conflicting. Plaintiff contends and he testified that Gilbert entered into an oral agreement to employ him for one year as sales manager at a stipulated figure of $6,000, payable in monthly installments of $500. Gilbert denied that such an agreement had been made, and insisted that

to have been communicated, Gilbert testified that he went out to plaintiff's apartment and that the maid and the house was working about 20 to 25 feet away from them. Gilbert testified all the great liaries about his experience, etc., Mr. Jones was continually talking about coming in as a - - - - - of the company, and I said: 'Mr. Jones, that would be ridiculous, because you know nothing about the technical and of our products, and we couldn't put you in as sales manager over these men who have been with us so many years. Now I would suggest that you come with us as a salesman *** and, if you can demonstrate your ability to sell thermo stoves, then we will talk to you later about a job as sales manager.' Well he said, 'I can sell it, I can sell it.' *** On the question of pay for his services or length of time he was to work, he said he would have to have a salary of $500 a month on account of his son in college and moving expenses, and I told him, 'That is all right, that is satisfactory to us. We will try you out at $500 a month and let you see if you can - let you demonstrate your ability to sell this stove.' He said he must have a one year contract. He said he ought to have a one year contract. I said we couldn't give him a one year contract and said, 'We have got to know that you can sell this thermo stove. If you can demonstrate that you can sell it, we will then talk contract with you.' On further interrogation by his counsel, Gilbert emphatically denied that he had agreed to give plaintiff a one-year contract and to pay him $500 a month for one year.

It thus appears that the testimony of the respective parties is sharply conflicting. Mr. Bailey contend and he testified that Gilbert entered into an oral agreement to employ him for one year as sales manager at a stipulated figure of $6,000, payable in monthly instalments of $500. Gilbert denied that such an agreement had been made, and indicated that

he did not need a sales manager, did not hire plaintiff as a sales manager because defendant already had one, but engaged him on a trial basis at a salary of $500 a month to promote the sale of the stucco product and not the regular products handled by defendant.

Defendant seeks to discredit the corroborating testimony of Nannie Holmes because of the lapse of time between the meeting at plaintiff's home and the trial. Its counsel argues that she could not have remembered the conversation so long nor repeated it so accurately, and leaves the implication that she was coached by quoting from the fable in Genesis: "The voice is Jacob's voice but the hands are the hands of Esau." Witnesses frequently testify to conversations long after they have taken place, but that does not necessarily discredit their statements. Counsel undoubtedly argued that circumstance to the jury, as well as the other reasons now suggested why her testimony is unworthy of belief, but the jurors evidently believed her testimony, or they may have concluded that plaintiff's version of the oral agreement, without corroboration, was plausible and true. They had before them ample evidence of the probabilities of the situation. Both previously to and after his employment with defendant, plaintiff had held responsible positions. He had acted as district sales manager for the Postage Meter Company from 1923 to 1930, and thereafter he was a partner and general sales manager of a brokerage house. He was also vice president and general sales manager of the Pure Foods Product Company, and in 1936 he became vice president and general sales manager of the Lowell Air Conditioning Corporation. After his discharge by defendant he was employed by Jamison and Company as central division sales manager in charge of 13 states, still later he became Eastern division sales manager for the American Gas Service Company and at the time of the trial he was district sales manager for Marchant Calculating Machine Company. The

he did not need a sales manager, did not hire plaintiff as a sales manager because defendant already had one, but engaged him on a trial basis at a salary of $300 a month to promote the sale of the stucco product and not the regular products handled by defendant.

Defendant seeks to discredit the corroborating testimony of Mannie Holmes because of the lapse of time between the meeting at plaintiff's home and the trial. Its counsel argues that she could not have remembered the conversation so long nor repeated it so accurately, and leaves the implication that she was coached by quoting from the Bible in Genesis: "The voice is Jacob's voice but the hands are the hands of Esau." Witnesses frequently testify to conversations long after they have taken place, but that does not necessarily discredit their statements. Counsel undoubtedly argued that circumstances to the jury, as well as the other reasons now suggested why her testimony is unworthy of belief, but the jurors evidently believed her testimony, or they may have concluded that plaintiff's version of the oral agreement, without corroboration, was plausible and true. They had before them ample evidence of the probabilities of the situation. Both previously to and after his employment with defendant, plaintiff had held responsible positions. He had acted as district sales manager for the Postage Meter Company from 1923 to 1930, and thereafter he was a partner and general sales manager of a brokerage house. He was also vice president and general sales manager of the Pure Foods Product Company, and in 1936 he became vice president and general sales manager of the Lowell Air Conditioning Corporation. After his discharge by defendant he was employed by Jamison and Company as central division sales manager in charge of 13 states, still later he became Eastern division sales manager for the American Gas Service Company and at the time of the trial he was district sales manager for Marchant Calculating Machine Company. The

jury may also have believed it unlikely that a man who had always held responsible positions would give up a contract ten months before its expiration and move his family to another city to become a salesman, at only a moderate raise in salary, without receiving the assurance that his tenure of office would be at least one year. Brushing aside the mass of conflicting evidence adduced upon trial, the issue was narrowed down to the question whether defendant entered into an oral agreement with plaintiff, by which the latter was employed as a sales manager for one year at a stipulated salary of $6,000, payable in monthly installments of $500, or whether he was merely retained as a salesman to promote the sale of thermo stucco and not defendant's other products, on a trial basis and at a salary of $500 a month. These were purely questions of fact. The jury resolved the issues adversely to defendant, and upon the record presented we would certainly not be warranted in usurping the function of the jury or in holding that their verdict was contrary to the manifest weight of the evidence.

Defendant takes the position that it was for the court to determine whether there was a contract, and its counsel argues that the court should have held as a matter of law that there was no such contract as plaintiff alleged, and therefore should have instructed the jury to return a verdict in favor of defendant. Courts in this state have generally held that where a suit is predicated upon a writing or a series of letters claimed to constitute a contract or agreement between the parties, it is for the court to determine as a matter of law whether the written memorandum or the letters taken together constitute an agreement. Telluride Power Co. v. Crane Co., 208 Ill. 218; Armstrong Paint Works v. Continental Can Co., 301 Ill. 102; Blakely Printing Co. v. Fort Dearborn Mercantile Co., Ill. App. No. 42596. But that rule of law is not applicable to the case at bar. The factual question presented was whether or not the oral agreement alleged by plain-

jury may also have believed it unlikely that a man who had always held responsible positions would give up a salary of ten months before its expiration and move his family to another city to become a salesman, at only a moderate raise in salary, without receiving the assurance that his terms of employment be at least one year. Striking aside the mass of conflicting evidence adduced upon trial, the issue was narrowed down to the question whether defendant entered into an oral agreement with plaintiff, by which the latter was employed as a sales manager for one year at a stipulated salary of $6,000, payable in monthly installments of $500, or whether he was merely retained as a salesman to promote the sale of thermo stoves and not defendant's other products, on a trial basis and at a salary of $500 a month. These were purely questions of fact. The jury resolved the issues adversely to defendant, and upon the record presented we would certainly not be warranted in usurping the function of the jury or in holding that their verdict was contrary to the manifest weight of the evidence.

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tiff had been made in Philadelphia, and the court could not have determined that question without weighing the evidence, passing upon the credibility of witnesses and exercising other functions reserved for the jury. Defendant relies principally on Chadwick v. Morris & Co., 170 Ill. App. 569, to support the contention that no definite agreement was ever reached between the parties. In the Chadwick case the court held that plaintiff's evidence did not tend to prove a yearly employment. He had testified that "I told him *** that the least I would go for was fifteen hundred a year; and he said 'all right.'" In the case at bar, however, plaintiff contends for a definite hiring for one year, and the jury so found. He testified that "I do have to have an agreement with a minimum of a year because otherwise I could not possibly afford to move my furniture, break up my home here, *** unless I would at least be guaranteed a year's salary," and that Gilbert answered him by saying, "Well, *** that is agreed upon. We will agree to that."

Plaintiff started work for defendant on March 29, 1937. A month later he received a short letter from Gilbert in Ohio, advising him that "the results of your efforts are not satisfactory," and "accepting" his resignation, "to take effect May 31, 1937." No other reasons were assigned for his discharge. One of the questions presented to the jury was whether his discharge was wrongful. Defendant claims that he failed to perform the duties for which he was hired, and specifically that he failed to file the daily report required from salesmen of the company. Plaintiff testified and the jury found that he was hired as a sales manager and not as a salesman, and there is evidence that the work performed by him during his one month of employment was the type of work ordinarily performed by a sales manager upon assuming his duties. During the first two weeks he prepared extensive statements and tables analyzing the

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company's sales for past years and breaking them down by period, product and salesman. During the same period he prepared a list of the various companies with which defendant had lost accounts, specifying the reasons why the accounts had been lost. He also formulated a comprehensive sales program for defendant and prepared statements of sales during January, February and March, 1937. With respect to these various documents, which are voluminous in their nature and were received in evidence, Gilbert testified that he returned them to plaintiff when they were presented with the comment that he was not interested. Nevertheless the jury must have considered them and the work they entailed as part of the services rendered during the period of plaintiff's employment. From April 13 to April 19 plaintiff made a sales survey of the state of Ohio, calling on prospective dealers and distributors whose names had been given to him by Gilbert. This list was also received in evidence. After his return from Ohio he remained in the office for approximately a week, then about April 26 he started on his second trip to Ohio, and while there he received the letter from Gilbert discharging him. In that letter Gilbert makes no mention of plaintiff's failure to file daily reports and specifies no reason for his discharge except the general one that his services were unsatisfactory. Phelps, who was described as the advertising and sales promotion manager, testified that plaintiff had failed to turn in daily reports of sales, but since plaintiff was not hired as a salesman, as he contended, it is readily understandable that he did not consider it necessary to make daily sales reports. With respect to plaintiff's discharge, defendant argues that it was incumbent upon plaintiff to offer evidence in support of his contention that he was wrongfully discharged, but that he simply rested his case by showing that he was discharged before the end of the year; and for his failure to meet this

company's sales for past years and breaking them down by period, product and salesman. During the same period he prepared a list of the various companies with which defendant had lost accounts, specifying the reasons why the accounts had been lost. He also formulated a comprehensive sales program for defendant and prepared statements of sales during January, February and March, 1937. With respect to these various documents, which are voluminous in their nature and were received in evidence, Gilbert testified that he returned them to plaintiff when they were presented with the comment that he was not interested. Nevertheless the jury must have considered them and the work they entailed as part of the services rendered during the period of plaintiff's employment. From April 13 to April 19 plaintiff made a sales survey of the state of Ohio, calling on prospective dealers and distributors whose names had been given to him by Gilbert. This list was also received in evidence. After his return from Ohio he remained in the office for approximately a week, then about April 26 he started on his second trip to Ohio, and while there he received the letter from Gilbert discharging him. In that letter Gilbert makes no mention of plaintiff's failure to file daily reports and specifies no reason for his discharge except the general one that his services were unsatisfactory. Phelps, who was described as the advertising and sales promotion manager, testified that plaintiff had left them in daily reports of sales, but since plaintiff was not hired as a salesman, as he contended, it is readily [illegible] that he did not consider it necessary to make daily sales reports. With respect to plaintiff's discharge, defendant argues that it was incumbent upon plaintiff to offer evidence in support of his contention that he was wrongfully discharged, but that he simply rested his case by showing that he was discharged before the end of the year; and for his failure to meet this

affirmative defense, there should have been a directed verdict. If plaintiff was hired for a year as the jury found, he could not be discharged except for good cause, and the facts and circumstances pertaining to his discharge were all submitted to the jury. It was purely a question of fact.

The case was fairly tried. No complaint is made as to the amount of the verdict, nor of any instructions given or refused by either of the parties, nor of the admissibility of any evidence, nor the conduct of counsel. The controverted issues were submitted to the jury and its verdict is supported by the evidence. Accordingly the judgment of the Superior court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

affirmative defense, there should have been a directed verdict. If plaintiff was hired for a year as the jury found, he could not be discharged except for good cause, and the facts and circumstances pertaining to his discharge were all submitted to the jury. It was purely a question of fact.

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JUDGMENT AFFIRMED.

Seaman and Sullivan, JJ., concur.

42596

321 I.A. 298

THE BLAKELY PRINTING COMPANY, a corporation, Appellee,

v.

FORT DEARBORN MERCANTILE CO., a corporation, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Blakely Printing Company brought suit against Fort Dearborn Mercantile Co. on a written contract and had summary judgment for part of its claim in the sum of $25,750 on motion and affidavits pursuant to rule 15 of the Supreme Court, the balance of the claim being held for trial. The entry of the judgment was resisted on the ground that defendant's answer and affidavits in support thereof set forth an oral agreement, denied that the writing sued upon is a contract, that defendant had pleaded a counterclaim for damages arising out of the averred oral agreement, and was therefore entitled to a trial by jury on the issues presented. The court entered the summary judgment on the theory that if the same evidence that is contained in defendant's affidavits were adduced on trial of the case, the court would have been required to direct a verdict against the defendant, excepting those issues which were reserved for trial.

The essential facts presented by the pleadings and affidavits disclose that plaintiff is in the printing business and defendant is a jobber of general merchandise whose business is conducted by means of an annual catalog sent by mail to retail dealers throughout the United States. From March to the forepart of June 1941 the parties had several conferences with respect to the printing of defendant's catalog for the year 1942. The writing sued upon was signed by plaintiff on

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a corporation,
Appellee,

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a corporation,
Appellant.

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MR. PRESIDING JUSTICE FULTON DELIVERED THE OPINION OF THE COURT.

Blakely Printing Company brought suit against Fort Dearborn Mercantile Co. on a written contract and had summary judgment for part of its claim in the sum of $27,750 on motion and affidavits pursuant to rule 19 of the Supreme Court, the balance of the claim being held for trial. The entry of the judgment was restated on the ground that defendant's answer and affidavits in support thereof set forth an oral agreement, denied that the writing sued upon is a contract, that defendant had pleaded a counterclaim for damages arising out of the averred oral agreement, and was therefore entitled to a trial by jury on the issues presented. The court entered the summary judgment on the theory that if the same evidence that is contained in defendant's affidavits were adduced on trial of the case, the court would have been required to direct a verdict against the defendant, excepting those issues which were reserved for trial.

The essential facts presented by the pleadings and affidavits disclose that plaintiff is a commercial printing business and defendant is a jobber of general merchandise whose business is conducted by means of an annual catalog sent by mail to retail dealers throughout the United States. Prior [illegible] the [illegible] of June 1941 the parties had several conferences with respect to the printing of defendant's catalog for the year 1942. The writing sued upon was signed by plaintiff on

June 9, 1941 and by defendant a day or two later. Inasmuch as the principal question presented is whether the instrument constitutes a written contract or merely specifications supplementing previous oral agreements, we set forth the contract in verbatim as follows:

"June 9, 1941

Fort Dearborn Mercantile Co.
37 South Wabash Avenue
Chicago, Illinois

Att'n: Mr. O. J. Karsted, President & Gen'l Mgr.

Gentlemen:

Our proposed service to you is based on the following specifications:

Quantity:
15,000 - 679 page catalogs
15,000 - 634 page catalogs

Stock:
68 pages in 678 page catalog and 64 pages in 634 page catalog of 80# White Mill No. 3 Enamel. We furnish.
480 pages (both catalogs) 50# grade B plus White Super - we furnish.

Cover:
1 Piece Heavy Paper Cover (stock about 250#).
We furnish.
Cover to be embossed - similar to your 1941 catalog.
End Sheets - we furnish.
Pages 2 and 3 of cover to be printed.

Binding:
Smythe Sewed, with a strip of muslin pasted over the backbone - cover glued on. First and last signatures to be reinforced with muslin and a twoage end sheet, pasted solid to the inside front cover and inside back cover. This means that the muslin reinforcement will be covered by the pasted end sheets.

*678	Page 2's	Catalogs 4's	8's	— 15,000 — 16's	to be bound as 24's	32's
	7	16	9	1	0	16

634	Page 2's	Catalogs 4's	8's	— 15,000 — 16's	to be bound as 24's	32's
	7	15	4	1	0	16

*Note: Oneida insert folded as 5-8's and sewed as a 24 and 16 page insert.

June 9, 1941 and by defendant a day or two later. Inasmuch as the principal question presented is whether the instrument constitutes a written contract or merely a specific [illegible] terminating previous oral agreements, we set forth the contents in [illegible] as follows:

"June 9, 1941

Port Dearborn Merchandise Co.
37 South Wabash Avenue
Chicago, Illinois

Attn: Mr. O. L. Kersted, President & Genl. Mgr.

Gentlemen:

Our proposed service to you is based on the following specifications:

Quantity:
15,000 - 678 page catalogs
15,000 - 634 page catalogs

Stock:
68 pages in 678 page catalog and 64 pages in 634 page catalog of 60# White Wove, 3 bonded. We furnish.
480 pages (both catalogs) 50# grade 2 plus White Super - we furnish.

Cover:
1 Piece Heavy Paper Cover (stock about 65#).
We furnish.
Cover to be embossed - similar to your 1941 catalog.
End Sheets - we furnish.
Pages 2 and 3 of cover to be printed.

Binding:
Smythe Sewed, with a strip of muslin pasted over the backbone - cover glued on. First and last [illegible] to be reinforced with [illegible] and [illegible] pasted solid to the inside front cover and [illegible] back cover. This means that the [illegible] will be covered by the pasted end sheets.

678 page catalogs	4/5	4/5	15,000	[illegible]	[illegible]	[illegible]
634 page catalogs	4/5	4/5	15,000	[illegible]	[illegible]	[illegible]
	7	10	9	1	0	10
	7	10	4	1	0	10

*Note: Omelda insert folded as 2-3's and sewed as a 44 and 10 page insert.

Inserts:
15,000 catalogs - 130 pages) you furnish.
15,000 catalogs - 90 pages) we tip in.

Inserts:
15,000 catalogs - 36 pages
15,000 catalogs - 32 pages
(16 pages three and four color - rugs, dinnerware, blankets, etc.) (8 pages in four color - dry goods.) (8 pages in two color - Clinton watches) (4 pages in two color - electric razors)

Inserts (Cont'd):
Note: Four page electric razor inserts in first 15,000 catalogs only.
We print these inserts from above 80# stock. You furnish color plates. We set composition, furnish black nickels, print and tip in.

Composition:
462 pages - we set.

Page Electros:
462 pages - we furnish.

Page Electros:
50 pages - you furnish.

Order Blanks:
100,000 two-color - we furnish stock and print - 30M flat to be inserted in catalog, 30M flat to you, 40M folded for #6 envelope, to you.

Index:
4 pages - we furnish stock and print.

'Mr. Dealer' Sheet:
1 page - we furnish stock and print.

Letter:
We print - you furnish stock.

Discount Sheet:
1 page - we furnish stock and print.

Return Envelopes:
You furnish.

We are to insert letter, 'Mr. Dealer' Sheet, Discount Sheet, Order Blank and Return Envelope in catalog. Catalogs are to be inserted in cartons furnished by us, taped, ready for mailing.

We are to furnish a 74x49 sheet to allow bleed on top and two sides.

Electros are to be your property.

Alterations:

Machine composition, per hour.....$4.00
Hand composition, per hour..... 3.75

Price: $27,475.00

Inserts:
15,000 catalogs - 130 pages) you furnish.
15,000 catalogs - 90 pages) we tip in.

Inserts:
15,000 catalogs - 36 pages
15,000 catalogs - 32 pages
(10 pages three and four color - rugs, linoleums, blankets, etc.) (6 pages in four color - dry goods.) (8 pages in two color - Clinton weaves) (4 pages in two color - electric razors)

Inserts (Cont'd):
Note: Four page electric razor inserts in first 15,000 catalogs only.
We print these inserts from above 30M stock. You furnish color plates. We set composition, furnish black models, print and tip in.

Composition:
462 pages - we set.

Page Electros:
462 pages - we furnish.

Page Electros:
50 pages - you furnish.

Order Blanks:
100,000 two-color - we furnish also the print -
30M flat to be inserted in catalog, 30M flat to you,
40M folded for 6 envelope, to you.

Index:
4 pages - we furnish stock and print.

'Mr. Dealer' Sheet:
1 page - we furnish stock and print.

Letter:
We print - you furnish stock.

Discount Sheet:
1 page - we furnish stock and print.

Return Envelopes:
You furnish.

We are to insert letter, 'Mr. Dealer' Sheet, discount sheet, Order Blank and return envelope in catalog. Catalogs are to be inserted in cartons furnished by us, taped, ready for mailing.

We are to furnish a 24x48 sheet to cover pieces on top and two sides.

Electros are to be your property.

Alterations:/

Machine composition, per hour.....$6.00
Hand composition, per hour..... .75

Price: $27,475.00

Attached is a duplicate of the letter received from the West Virginia Pulp and Paper Company.
Thanking you very kindly for this order, I remain

Sincerely yours,

The Blakely Printing Company
(signed) Harley Hohm

Accepted by Fort Dearborn Mercantile Company
Per O. J. Karsted, Pres."

The only substantial element omitted from the foregoing document is the time of performance. Defendant contends that the writing is not a contract but only a form of specifications supplementing an oral agreement for the printing of the catalog entered into June 6, 1941 which required plaintiff to deliver copies of the catalog between October 20, 1941 and November 1, 1941 and that the time of delivery was made the essence of the oral agreement. Plaintiff printed 29,694 catalogs, of which 751 are held at the bindery ready for delivery upon defendant's instructions, 27,832 catalogs were delivered to defendant's forwarding agent, and the balance, including sample books, were received by defendant at the bindery.

The writing called for the printing of a catalog from electros or electrotypes, which involved the following processes. Defendant prepared and delivered copy to plaintiff corporation which set the type and made page proofs thereof. These page proofs were given temporary numbers in the order in which the copy was received. The temporary page numbers were replaced with permanent page numbers as soon as plaintiff was informed by defendant of the permanent position and page numbers in the catalog. Electrotypes for the pages could not be made until the proof of such pages was returned to plaintiff with defendant's O.K. and until defendant furnished plaintiff with the permanent page number for each page. In the performance of the contract plaintiff was required to lock up sets of electrotypes in forms for printing signatures. A form could not be

Attached is a duplicate of the letter received from the West Virginia Pulp and Paper Company.

Thanking you very kindly for this order, I remain

Sincerely yours,

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(signed) Harley Cohn

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Per O. L. Harted, Pres."

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locked up and put on the printing press until plaintiff had received from defendant the permanent page number of each page in such form, and as soon as plaintiff received copy it set up the same in type and made page proofs thereof for defendant's approval or correction. Defendant began to deliver copy July 25, 1941 but did not deliver the last of such copy until October 15, 1941, and held some of the proof as long as 30 and 60 days before returning the same to plaintiff. Defendant did not furnish plaintiff with permanent page numbers for some of the pages of the catalog until October 29, 1941.

It appears from the pleadings and affidavits that before the contract sued upon was entered into by the parties, defendant's advertising manager inspected plaintiff's printing plant and was assured that the presses needed would be available when the catalog was to be printed. As soon as plaintiff received permanent page numbers for a set of pages contained in a signature the electrotypes thereof were made, locked up and put on the presses, and in order to speed up the work of printing said signatures plaintiff kept its presses running day and night. Due to market and merchandising conditions defendant was unable to purchase many of the items that were listed in the catalogs of previous years, and such items of merchandise were therefore not listed in the 1942 catalog, and many items and lines of merchandise that were not listed in previous issues were included in the 1942 catalog. As late as August 1941 defendant's advertising manager was having difficulties in listing items that would appear in the catalog because his firm was unable to get prices from manufacturers and guaranties of delivery, and for that reason defendant's advertising manager stated that "it was taking them an unusual long time to prepare the copy" for the catalog and that defendant "would not be able to get it [the catalog] out at the regular time of the year."

The complaint alleges that there is due and owing

looked up, and at the [illegible] [illegible]
received from defendant the permanent [illegible]
in such form, and [illegible] plaintiff [illegible]
the same in type and [illegible] for [illegible]
approval or correction. [illegible] have [illegible] July
25, 1941 but did not deliver the [illegible]
12, 1941, and [illegible] one of the [illegible]
before returning the same to plaintiff. [illegible]
nial plaintiff with [illegible] for [illegible]
of the catalog until October 13, 1941.

It appears [illegible] that prior
the contract [illegible] into [illegible]
ant's advertising manager [illegible] printing plant
and was assured that the process [illegible] available when
the catalog was to be printed. As soon as [illegible]
permanent page numbers for [illegible] of pages contained in a signature
the electrotypes thereof were made, locked up, and put on the
presses, and in order to operate at the [illegible] of printing said [illegible]
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get it [the catalog] out at the regular time of the year."

The complaint alleges that there is due and owing

from defendant to plaintiff, after allowing to defendant a credit of $601.83 for certain adjustments mentioned in the complaint, the sum of $29,543.45, together with interest thereon from February 1, 1942, for printing the catalog under the alleged written agreement of June 9, 1941 as heretofore set forth. Defendant's answer denies that the writing sued upon is a contract; denies that plaintiff is entitled to interest; denies that the credit allowed on the adjustment is correct; and alleges that defendant is entitled to a credit of $758.59 instead of $601.83. The disputed difference of $156.76 and the claim for interest were held for trial, as well as defendant's counterclaim for $300 arising out of plaintiff's alleged failure to supply cartons in accordance with the sample submitted.

By order of court certain matters stated in the answer stand as a counterclaim. The counterclaim alleges that June 6, 1941 plaintiff made an oral agreement with defendant for the printing of the catalog and agreed to deliver the required number of copies thereof between October 20 and November 1 of that year, and that the time of delivery should be the essence of the agreement; that plaintiff breached the contract in that it printed the catalog on inferior paper, by reason whereof defendant sustained damages in the sum of $750; that plaintiff also breached the oral agreement in that it failed to deliver the required copies of the catalog during the period of time fixed by the undertaking but delivered the same between November 15 and December 11, 1941, and by reason thereof defendant sustained loss and damage in the sum of $25,000; that the cartons for mailing the catalogs were inferior in quality with resultant damage to plaintiff amounting to $300.

It is urged by defendant that its counteraffidavits created five issues which should have been submitted to the jury as follows: 1. whether the contract was oral or in writing;

from defendant to plaintiff, after allowing to defendant a credit of $601.83 for certain adjustments mentioned in the complaint, the sum of $29,343.45, together with interest thereon from February 1, 1942, for printing the catalog under the alleged written agreement of June 9, 1941 as hereinbefore set forth. Defendant's answer denies that the writing sued upon is a contract; denies that plaintiff is entitled to interest; denies that the credit allowed on the adjustment is correct; and alleges that defendant is entitled to a credit of $2753.39 instead of $601.83. The disputed difference of $156.76 and the claim for interest were held for trial, as well as defendant's counterclaim for $300 arising out of plaintiff's alleged failure to supply cartons in accordance with the sample submitted.

By order of court certain matters stated in the answer stand as a counterclaim. The counterclaim alleges that June 6, 1941 plaintiff made an oral agreement with defendant for the printing of the catalog and agreed to deliver the required number of copies thereof between October 20 and November 1 of that year, and that the time of delivery should be the essence of the agreement; that plaintiff breached the contract in that it printed the catalog on inferior paper, by reason whereof defendant sustained damages in the sum of $750; that plaintiff also breached the oral agreement in that it failed to deliver the required copies of the catalog during the period of time fixed by the undertaking but delivered the same between November 15 and December 11, 1941, and by reason thereof defendant sustained loss and damage in the sum of $25,000; that the cartons for wrapping the catalogs were inferior in quality with resultant damage to plaintiff amounting to $300.

It is urged by defendant that the counterclaim alleges created five issues which should have been submitted to the jury as follows: 1. whether the contract was oral or in writing;

2. as to the terms of the contract, particularly with respect to the date of delivery; 3. as to whether the grade and quality of paper used was in accordance with the specifications; 4. whether the cartons in which the catalogs were to be mailed were in accordance with the agreement; and 5. as to the question of overcharge. The issues under points 4 and 5 were reserved for trial. The questions involved in points 2 and 3 related to defendant's counterclaim for breach of an oral agreement and the damages resulting therefrom. The principal question therefore presented arises under the first point, namely, whether the contract was oral or in writing. Plaintiff contends and the court held that the letter of June 9 heretofore set forth, constitutes a contract in writing which superseded all previous negotiations between the parties. Defendant, on the other hand, argues that the negotiations were concluded June 6, 1941 by an oral agreement and that the instrument sued on is not a contract but only a form of specifications supplemental to the oral agreement. It is also urged by defendant that under the pleadings and the affidavits presented, the question whether the contract was oral or in writing was not determinable by the court and should have been submitted to a jury. The validity of the first three points raised by this appeal depends upon the determination of that controversy.

The test usually applied to instruments upon which suit is predicated for the purpose of determining whether they are contracts in writing, is to examine the document and resolve from its contents whether it expresses on its face without ambiguity all the agreements and obligations. In the case at bar the letter of June 9 was submitted as a bid or proposal and was accepted on the face thereof. The contention that it is merely a form of specifications supplementing the oral agreement alleged to have been entered into June 6, 1941, is effectively

2. as to the terms of the contract, particularly with respect to the date of delivery; 3. as to whether the grade and quality of paper used was in accordance with the specific items; 4. whether the cartons in which the stationery was to be shipped were in accordance with the agreement; and 5. as to the question of overcharge. The issues under points 1 and 2 were reserved for trial. The questions involved in points 2 and 3 related to defendants counterclaim for breach of an oral agreement and the damages resulting therefrom. The principal question thereafter presented arises under the first point, namely, whether the contract was oral or in writing. Plaintiff contends and the court held that the letter of June 9 hereinbefore set forth, constitutes a contract in writing which superseded all previous negotiations between the parties. Defendant, on the other hand, argues that the negotiations were concluded June 6, 1941 by an oral agreement and that the instrument sued on is not a contract but only a form of specifications supplemental to the oral agreement. It is also urged by defendant that under the pleadings and the evidence presented, the question whether the contract was oral or in writing was not determinable by the court and should have been submitted to a jury. The validity of these three points raised by this appeal depends upon the determination of that controversy.

The test usually applied to instruments upon which suit is predicated for the purpose of determining whether they are contracts in writing, is to examine the document and receive from its contents whether it expresses on its face without ambiguity all the agreements and obligations. In the case at bar the letter of June 9 was submitted [illegible] proposal and was accepted on the face thereof. The contention that it is merely a form of specifications supplementing the oral agreement alleged to have been entered into June 6, 1941, is effectively

refuted by defendant's own counteraffidavits, from which it appears that on May 15, 1941 Klamer, defendant's advertising manager, prepared letters addressed to various printing establishments asking for bids or proposals for printing defendant's 1942 catalog and presented them to Karsted, defendant's president, for signature. One of these letters, addressed to plaintiff, states that the "Proposal is to be submitted within ten days." Plaintiff submitted its proposal on May 26, 1941 but it was not accepted. Thereafter Klamer and plaintiff's salesman Hohm had several conferences, one of which took place June 6, 1941. Klamer states in his counteraffidavit that during that conference Hohm asked whether defendant "would consider giving them the contract" and that Klamer said that if plaintiff would agree to furnish 50 larger sheets and that the electros should become defendant's property, defendant "would give them the contract." Karsted states in his counteraffidavit that Klamer reported to him on the same day that he had told Hohm that defendant "would give them the job of printing and supplying their catalog" and that he later received the writing sued upon, signed it and delivered it to plaintiff. It is thus obvious from defendant's counteraffidavits that the contract for printing the catalog was not given on June 6, 1941 but that Klamer then told Hohm that defendant "would give them the contract" if plaintiff would meet the new terms. In this connection it should be noted that the following provisions of the contract sued upon are not contained in defendant's letter of May 15, 1941 or in plaintiff's proposal of May 26, 1941, namely, that the electros were to become defendant's property and that certain alterations were to be made with respect to the rates to be paid for machine and hand compositions for setting up the material. It is also significant that Klamer states in the counteraffidavit that the alleged oral agreement is based in part on a statement that he made to Hohm on May 5, 1941, more than a month before June 6,

refuted by defendant's own counteraffidavits, from which it appears that on May 15, 1941 Glaser, as manager of advertising manager, prepared letters addressed to various advertising establishments asking for bids or proposals for [illegible] defendant's 1942 catalog and presented them to [illegible], defendant's president, for signature. One of these letters, addressed to plaintiff, states that the "proposal is to [illegible] within ten days." Plaintiff submitted its proposal on May 20, 1941 but it was not accepted. Thereafter Glaser and plaintiff's salesman Hohm had several conferences, one of which took place June 6, 1941. Glaser states in his counteraffidavit that during conference Hohm asked whether defendant "would consider giving them the contract" and that Glaser said that if plaintiff would agree to furnish 50 larger sheets and that the expense should become defendant's property, defendant "would give them the contract." Quoted states in his counteraffidavit that Glaser reported to him on the same day that he had told Hohm that defendant "would give them the job of printing and supplying their catalog" and that he later received the writing sent upon signed it and delivered it to plaintiff. It is thus obvious from defendant's counteraffidavits that the contract for publishing the catalog was not given on June 6, 1941 but that Glaser then told Hohm that defendant "would give them the contract" if plaintiff would meet the new terms. In this connection it should be noted that the following provisions of the contract sued upon are not contained in defendant's letter of May 15, 1941 or in plaintiff's proposal of May 20, 1941, namely, that the election were to become defendant's property and that certain alterations were to be made with respect to the [illegible] for meeting and hand compositions for setting up the material. It is also significant that Glaser states in the counteraffidavit that the alleged oral agreement is based in part on a statement that he made to Hohm on May 7, 1941, more than a month before June 6,

as follows: "I further told him that the main body of the book must be printed on grade B plus 50# white super paper and that 64 pages, part of which would be printed in color, would be on 80# White Mill No. 3 Enamel." From the foregoing circumstances it would appear that defendant attempted to set up as against the written contract not only the alleged oral agreement but a conversation that was had more than a month before. The complaint alleges that the instrument sued on is a contract. Plaintiff undoubtedly so considered it because the letter ends with the sentence, "Thanking you very kindly for this order," and defendant approved the "order" on its face by marking "Accepted" over the signature of its president. It is thus apparent that the writing is an agreement consisting of a proposal or order which is approved by defendant, embodying all the undertakings of the parties except the date of delivery, a question which will later be considered and discussed.

Under the general rule, and except in cases where there is an issue of fact as to the validity of the contract, the question whether a writing constitutes an agreement is one for the court and not for the jury. In Telluride Power Co. v. Crane Co., 208 Ill. 218, judgment was entered upon a directed verdict. It was there contended that the trial court should have submitted to the jury "all the negotiations, oral and written, had between the parties" before the making of the contract sued upon. In affirming the judgment the court said: "The questions as to what writings should be considered, and whether or not those considered constituted a written contract, and whether or not the written contract fully expressed the agreement between the parties, were for the court. The rule is, that when the writings show, upon inspection, a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings. The fact that a

as follows: "I further talk him that the main copy of the book must be printed on grade a plus 20# white paper and that 64 pages, part of which would be printed in color, would be on 80# White Mill No. 3 Enamel." From the foregoing circumstances it would appear that defendant attempted to set up as against the written contract not only the alleged oral agreement but a conversation that was had more than a month before. The complaint alleges that the instrument sued on is a contract. Plaintiff undoubtedly so considered it because the letter ends with the sentence, "Thanking you very kindly for this order," and defendant approved the "order" on its face by putting "accepted" over the signature of its president. It is thus apparent that the writing is an agreement consisting of a proposal or order which is approved by defendant, embodying all the undertakings of the parties except the date of delivery, a question which will later be considered and discussed.

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point has been omitted which might have been embodied therein will not open the door to the admission of parol evidence in that regard." In Armstrong Paint Works v. Continental Can Co., 301 Ill. 102, the court held that all prior conversations and parol agreements between the parties are merged in the written contract and that the question whether the agreement is a full expression of the undertaking of the parties must be determined by the court from the contract itself. The reason for the rule is stated as follows: "When parties sign a memorandum expressing all the terms essential to a complete agreement they are to be protected against the doubtful veracity of the interested witnesses and the uncertain memory of disinterested witnesses concerning the terms of their agreement, and the only way in which they can be so protected is by holding each of them conclusively bound by the terms of the agreement as expressed in the writing."

With respect to the delivery of the catalog, about which the agreement is silent, and the promptness with which plaintiff performed its undertaking, the affidavits presented disclose that before the agreement was made Klamer inspected plaintiff's plant and was assured by Hamm that the presses would be available "to get out our book on time;" that he visited the printing plant regularly from the time plaintiff began to deliver copies and saw the presses in full operation. Plaintiff's production manager Fyfe stated by affidavit that "As we received the copy, we set it up in type and affixed the temporary page number designated by the defendant. As soon as a page of copy was set up in type, we made a proof of it and immediately thereafter submitted the proof to the defendant for its OK or correction." These statements are not denied in any counteraffidavit and are borne out by Klamer's own statements that he was at the plant to inspect the forms that were running on the press and to OK forms which were ready to run and "would visit their plant for the said

point has been omitted which might have been [illegible] concern will not open the door to the admission of parol [illegible] in that regard." In Westerne Petrol. Corp. v. [illegible], 301 Ill. 102, the court held that [illegible] parol agreements between the parties are merged in the written contract and that the question whether the agreement in full expression of the understanding of the parties must be determined by the court from the contract itself. The reason for the rule is stated as follows: "When parties sign a memorandum expressing all the terms essential to a complete agreement they are to be protected against the doubtful veracity of the witnesses and the uncertain memory of interested witnesses concerning the terms of their agreement, and the only way in which they can be so protected is by holding such of them conclusively bound by the terms of the agreement as expressed in the writing."

With respect to the delivery of the machine, about which the agreement is silent, and the promises with which plaintiff performed its undertaking, the affidavits presented disclose that before the agreement was made Elmer informed plaintiff's plant and was assured by them that the presses would be available "to get out our book on time;" that he visited the printing plant regularly from the time plaintiff began to deliver engines and saw the presses in full operation. Plaintiff's production manager Tyle stated by affidavit that "as we received the copy, we set it up in type and affixed the [illegible] page number [illegible]-nated by the defendant. As soon as a form of copy was set up in type, we made a proof of it and immediately [illegible] transmitted the proof to the defendant for its OK or correction." These statements are not denied in any counteraffidavit. On cross-examination by Elmer's own statements that he was at the plant to inspect the forms that were running on the presses and to see forms which were ready to run and "would visit their plant for the said

purpose as late as from 5:00 o'clock to 5:30 in the afternoon to OK forms which would enable them to run them during the night." It is thus admitted that the presses were not only available but were kept running day and night, and Klamer's counteraffidavit also shows that plaintiff acted diligently in binding the catalogs. On one occasion, when Klamer informed Fyfe that the binders at Brock & Rankin, which had in previous years taken care of binding defendant's catalogs, were on strike, Fyfe immediately transferred 10,000 catalogs to two other binderies, namely, Spinner Bros. and R. R. Donnelley & Sons Company. These circumstances render untenable defendant's argument that plaintiff failed to perform its obligation within a reasonable time. What constitutes a reasonable time when the time for performance is not fixed by the agreement is stated in 17 C. J. S. Contracts, sec. 503, at pp. 1067-1068, as follows: "The question as to what is a reasonable time for the performance of a contract fixing no time for performance depends on the nature of the contract and the particular circumstances. In deciding whether an undertaking has been performed within reasonable time, the material difficulties and hazards attending it, the amount of diligence used, and frustrated attempts at performance should be considered. Perhaps as accurate a definition of reasonable time as may be given is that it is such time as is necessary conveniently to do what the contract requires should be done." This doctrine is affirmed in Bowen v. Detroit City Railway, 54 Mich. 496.

Under the pleadings defendant was required to prove its counterclaim by evidence that plaintiff was not diligent or that it failed to perform its obligation under the contract within a reasonable time. Its answer and counteraffidavits utterly fail in this respect. We find no evidence of lack of diligence on plaintiff's part or that plaintiff failed to perform its obligations under the agreement within a reasonable time. Indeed, the evidence refutes the charge made in the counterclaim and

purpose as late as from 7:00 o'clock to 7:30 in the afternoon to OK forms which would enable them to run the morning the night."

It is thus admitted that the presses were not only available but were kept running day and night, and Elmer's counteraffidavit also shows that plaintiff's men diligently, in binding the catalogs. On one occasion, when Elmer informed Tyre that the binders at Brook & Kemble, which had in previous years taken care of binding defendant's catalogs, were on strike, Tyre immediately transferred 10,000 catalogs to two other binderies, namely, Spinner Bros. and H. O. Cornelley & Sons Company. These circumstances render untenable defendant's argument that plaintiff failed to perform its obligation within a reasonable time. What constitutes a reasonable time when the time for performance is not fixed by the agreement is stated in 17 C. J. S. Contracts, sec. 503, at pp. 1067-1068, as follows: "The question as to what is a reasonable time for the performance of a contract fixing no time for performance depends on the nature of the contract and the particular circumstances. In deciding whether an undertaking has been performed within reasonable time, the material difficulties and hazards attending it, the amount of diligence used, and frustrated attempts at performance should be considered. Perhaps as accurate a definition of reasonable time as may be given is that it is such time as is necessary conveniently to do what the contract requires should be done." This statement is affirmed in Bowen v. Detroit City Railway, 54 Mich. 496.

Under the pleadings defendant was required to prove its counterclaim by evidence that plaintiff was not diligent or that it failed to perform its obligation under the contract within a reasonable time. Its answer and counter affidavits failed in this respect. We find no evidence of lack of diligence on plaintiff's part or that plaintiff failed to perform its obligations under the agreement within a reasonable time. Indeed, the evidence refutes the charge made in the counterclaim and

clearly demonstrates that plaintiff was diligent. Perhaps the best and only plausible explanation for the delay in making deliveries of the catalog is found in defendant's own conduct and the attending circumstances. Unlike previous years, defendant was unable to purchase many of the items of merchandise that it desired to list in the catalog, and items that were listed in prior years could not be included in the 1942 issue. Defendant was unable to get prices from manufacturers or guaranties of delivery for merchandise, and because of these circumstances "it was taking them an unusual long time to prepare the copy." It may well be that defendant desired to get these catalogs in the hands of its prospective customers in the latter part of November, but the facts disclosed by the counteraffidavits made this impossible. For these conditions, plaintiff was not to blame, and therefore under the law applicable to the circumstances presented we hold that in the absence of any specific date fixed for delivery, plaintiff was required to deliver catalogs within a reasonable time, and it fully complied with the requirements of the law in that respect.

In actions for breach of contract a party seeking damages for loss of profits must show the reality of the loss and that the breach was the proximate cause thereof. Therefore, in order to maintain its action on the counterclaim it was incumbent upon defendant to prove the loss of sales during a given period. The only evidence adduced by defendant is a table of sales during each of the 12 months in the years 1938 to 1941, and a record of delivery of catalogs in 1940 and 1941. These tables fail to show the amount of sales in any year during that part of December that is involved in this proceeding, and upon the proof offered, if it had been submitted to a jury, the court would have been required to direct a verdict because there was not sufficient proof of damages or the proximate cause thereof. The foregoing conclusions dispose of the first two issues

clearly demonstrates that plaintiff was diligent. Perhaps the best and only plausible explanation for the delay in making deliveries of the catalog is found in defendant's own conduct and the attending circumstances. Unlike previous years, defendant was unable to purchase many of the items of merchandise that it desired to list in the catalog, and items that were listed in prior years could not be included in the 1942 issue. Defendant was unable to get prices from manufacturers or guarantees of delivery for merchandise, and because of these circumstances "it was taking them an unusual long time to prepare the copy." It may well be that defendant desired to get these catalogs in the hands of its prospective customers in the latter part of November, but the facts disclosed by the counter-affidavits made this impossible. For these conditions, plaintiff was not to blame, and therefore under the law applicable to the circumstances presented we hold that in the absence of any specific date fixed for delivery, plaintiff was required to deliver catalogs within a reasonable time, and it fully complied with the requirements of the law in that respect.

In actions for breach of contract a party seeking damages for loss of profits must show the reality of the loss and that the breach was the proximate cause thereof. Therefore, in order to maintain its action on the counterclaim, it was incumbent upon defendant to prove the loss of sales during a given period. The only evidence adduced by defendant is a table of sales during each of the 12 months in the years 1939 to 1941, and a record of delivery of catalogs in 1940 and 1941. These tables fail to show the amount of sales in any year during that part of December that is involved in this proceeding, and upon the proof offered, if it had been submitted to a jury, the court would have been required to direct a verdict because there was not sufficient proof of damages or the proximate cause thereof. The foregoing conclusions dispose of the first two issues

created by defendant's counteraffidavits, namely, whether the contract was oral or in writing, and as to the terms thereof, especially with respect to delivery. The only remaining point which was not held for trial relates to the grade and quality of paper used, in accordance with the specifications. That issue was involved in defendant's counterclaim for breach of an oral contract, and in view of our conclusion that there was no oral contract it will be unnecessary to consider that point.

After careful consideration of the record we are impelled to hold that defendant had no defenses which were required to be submitted to a jury and that it was therefore not deprived of a right to trial by jury. Accordingly, the judgment appealed from should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan and Scanlan, JJ., concur.

created by defendant's conduct validity, namely, whether the contract was oral or in writing, and as to the terms thereof, especially with respect to delivery. The only remaining point which was not held for trial relates to the grade and quality of paper used, in accordance with the specifications. What issue was involved in defendant's counterclaim for breach of an oral contract, and in view of our conclusion that there was no oral contract it will be unnecessary to consider that point.

After careful consideration of the record we are impelled to hold that defendant had no defenses which were required to be submitted to a jury and that it was therefore not deprived of a right to trial by jury. Accordingly, the judgment appealed from should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan and Hamlin, JJ., concur.

42615

DUNCAN METER CORPORATION,
a corporation,
Plaintiff,

v.

THE PARKING METER CORPORATION
OF AMERICA, a corporation,
THE NEW ENGLAND COMPANY, a
corporation, NEWMAN S. PRICE,
HARVEY SHAW and WILLIAM DOMROE,
Defendants.

HARVEY SHAW,
Appellee,

v.

DUNCAN METER CORPORATION,
a corporation,
Appellant.

321 I.A. 299

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On August 18, 1939 the New England Company, an Ohio corporation, brought an attachment suit against the Parking Meter Corporation of America, also an Ohio corporation, making Miller Meters, Inc., and Duncan Meter Corporation garnishee defendants. The suit was based upon a judgment of $503.05, entered in favor of plaintiff June 29, 1939 in the Municipal court of Cleveland, Ohio. Harvey Shaw and Newman S. Price had leave to intervene in the garnishment proceeding. Price's claim was predicated upon a judgment against the Parking Meter Corporation of America obtained in the Municipal court of Cleveland, Ohio, May 31, 1939 and a levy made pursuant thereto August 11, 1939. Shaw's claim was based on an alleged bailment of 300 meters to which he claimed title and which were in the possession of the Duncan Meter Corporation. Pursuant to a hearing in the Municipal court of Chicago an order was entered May 17, 1940 wherein the Miller Meters, Inc., was discharged as garnishee; the court found that Duncan Meter Corporation was holding 340 meters belonging to the Parking Meter Corporation

of America and directed them to be divided between the New England Company, plaintiff in the garnishment proceeding, and Newman S. Price, one of the intervening petitioners, ordered that the meters be turned over to the bailiff, that special execution issue, and that they be sold to satisfy the judgments entered. The petition of Harvey Shaw was dismissed.

Shaw's counsel testified without contradiction that immediately upon entry of the judgment, he advised Samuel G. Rautbord, secretary of the Duncan Meter Corporation and its attorney, that he would take an appeal, to which Rautbord replied that "he would hold everything in abeyance subject to my serving notice of appeal." Nevertheless, there followed a series of unusual and significant events. Within a week the attaching creditors caused special executions to issue on their judgments, and May 24, 1940 the bailiff levied on 340 meters in possession of the Duncan Meter Corporation. After levy the bailiff left the meters in the custody of Duncan Meter Corporation at its warehouse, as custodian for the bailiff, and took a receipt therefor. On the sale which followed one of the attaching creditors purchased 37 meters and the other 303. The bailiff took receipts from the purchasers in satisfaction of their judgments and made his return to that effect. Following unsuccessful attempts by the attaching creditors to dispose of the meters, they approached Duncan Meter Corporation as a buyer, and terms were finally agreed upon by which Duncan Meter Corporation purchased from the New England Company 37 and from Price 303 meters, being the 340 meters sold by the bailiff. The purchases were consummated between June 11 and 14, 1940 and New England Company and Price then executed bills of sale for the meters to Duncan Meter Corporation. Neither Shaw nor his attorneys then had any knowledge of the levy and sale or the transactions that followed

[illegible]

and on June 12, 1940, which was within 30 days after the entry of the judgment in the Municipal court May 17, 1940, Harvey Shaw filed his notice of appeal. June 13, 1940 the notice of appeal was served upon Samuel G. Rautbord, attorney for the Duncan Meter Corporation, and on all the other parties to the litigation. The appeal was later perfected and November 28, 1941 we reversed the judgment of the Municipal court (Gen. No. 41441, not published in full, 312 Ill. App. 183), and since the cause had been tried by the court without a jury and there was no substantial dispute as to the essential facts, we held that Shaw was the rightful owner of 300 Miller Multiple Coin Parking Meters, Nos. WD-1 to WD-300, inclusive, and entered judgment, upon findings of fact, that he recover from the Duncan Meter Corporation the 300 specified meters, and commanded Duncan Meter Corporation to deliver them to Shaw. The facts and controversies involved in that litigation are sufficiently set forth in our opinion and need not here be repeated.

Shaw's attorneys first learned of the levy and sale of the meters from Rautbord after the cause had been pending on appeal for about six months, and shortly after our opinion was filed, they made demand for the delivery of the meters to Shaw in accordance with our judgment, which was refused. Thereafter on May 7, 1942 Shaw filed a sworn amended counterclaim against Duncan Meter Corporation in which he set forth the judgment order here entered on reversal of the Municipal court cause; alleged that Duncan Meter Corporation did not file a petition for rehearing after the entry of our judgment nor take an appeal therefrom, by reason whereof the judgment remained in full force and effect; that the Duncan Meter Corporation did not deliver the 300 meters specifically described in our order, or any part thereof, to Shaw as ordered; and he prayed judgment for the fair market value of these meters.

May 29, 1942 Duncan Meter Corporation filed a sworn amended answer to Shaw's amended counterclaim wherein it admitted reversal of the judgment entered in the Municipal court and the entry of our order in pursuance thereof; admitted that our judgment remained in full force and effect by reason of the failure of Duncan Meter Corporation to file a petition for rehearing or to take an appeal from that judgment, and also admitted that it did not deliver the 300 meters to Shaw as ordered. Thereafter the cause was tried in the Superior court and November 13, 1942 judgment was entered in favor of Shaw and against Duncan Meter Corporation in the sum of $9,000, from which this appeal is taken.

The principal question presented is whether our judgment in cause No. 41441 constituted an adjudication of every defense interposed by the Duncan Meter Corporation except of the one question of value. The trial court so held and refused to admit and consider any evidence except on the question of the value of the meters. It will be noted at the outset that May 17, 1940 Duncan Meter Corporation held for and on behalf of the Parking Meter Corporation of America 1000 Miller Multiple Coin Parking Meters. Of these, 300 were specifically designated as WD-1 to WD-300 and the other 700 had no designation. Shaw as intervening petitioner claimed the 300 designated meters to which he was entitled. As a result of the Municipal court's judgment denying and dismissing Shaw's intervening petition the 300 parking meters WD-1 to WD-300 remained with the Duncan Meter Corporation. With respect to the 700 other meters, the Municipal court "Ordered that Parking Meter Corporation of America for the use of New England Company, a corporation, and Newman S. Price do have and recover from the garnishee defendant, Duncan Meter Corporation, 340 Miller Multiple Coin Parking Meters and that said garnishee defendant

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Duncan Meter Corporation turn over forthwith to the Bailiff of the Municipal Court of Chicago on behalf of said New England Company, a corporation, and Newman S. Price, said 340 Miller Multiple Coin Parking Meters." At the time of the entry of the judgment on May 17, 1940 an execution issued against the Duncan Meter Corporation to deliver to the bailiff "340 Miller Multiple Coin Parking Meters." The return of the bailiff shows that on May 24, 1940 he levied on "340 Miller Multiple Coin Parking Meters." The record of the bailiff of the Municipal court shows that the levy was made by him on "340 Miller Multiple Coin Parking Meters" and the notice of the bailiff's sale discloses that he sold "340 Miller Multiple Coin Parking Meters." It thus appears that neither the judgment of the Municipal court nor the execution, the return thereof, the notice of sale, the report of sale, nor any of the records of the Municipal court referred in any way whatsoever to the 300 WD-1 to WD-300 meters which belonged to Shaw. But after we had decided in favor of Shaw in case No. 41441 Duncan Meter Corporation evidently conceived the plan of attempting to prove by its president that the 300 WD-1 to WD-300 meters were levied upon by the bailiff. The court refused to allow the president to so testify. As a result of these circumstances Duncan Meter Corporation takes the anomalous position that it desires to rely on the records of the Municipal court to prove the fact that a levy was made and at the same time to impeach the record by attempting to show something that is contained neither in the judgment nor any other part of the record. We think the court's ruling was entirely correct. The law is well settled and the principle is generally recognized that a judicial record cannot be contradicted, varied or explained by evidence beyond or outside of the record itself. It was so held in the early case of Roche v. Beldam, 119 Ill. 320, wherein the court said that "No rule of law is better

[illegible]

settled, both by the decisions of this and other courts, than that a record like this one imports verity, and can not be contradicted by parol." In Sargent v. City of Evanston, 154 Ill. 268, it was said that "The record of a court must be judged by itself alone, and its invalidity cannot be shown by evidence aliunde." In discussing the question here under consideration the court in People v. Ward, 272 Ill. 65, quoted with approval from the early case of Harris v. Lester, 80 Ill. 307, as follows: "'The record of a court can never be contradicted, varied or explained by evidence beyond or outside of the record itself. Any other rule would be most disastrous in its results. A judicial record contains evidence of its own validity, and should testimony dehors the record itself be admitted to contradict or vary its recitals it would render such records of no avail, and definite sentences would afford but slight protection to the rights of parties once solemnly adjudicated. Hence all records must be tried and construed by themselves.'" Aside from these considerations it is difficult to understand why Duncan Meter Corporation, which had 1000 meters in its possession, 700 of which were undesignated and subject to levy under the order of the Municipal court, should have chosen to turn over the 300 meters WD-1 to WD-300 claimed by Shaw, instead of taking them from the other 700 meters, especially in view of its knowledge that Shaw was about to take an appeal from the adverse judgment rendered against him in the Municipal court.

With respect to the contention that our judgment in case No. 41441 was not an adjudication of all its purported defenses except the value of the meters, Duncan Meter Corporation relies on the fact that the various transactions which occurred in 1940 relating to the levy and sale of the meters to the attaching creditors and by which Duncan Meter Corporation acquired by purchase the alleged ownership of the meters

municipal court.

designated as WD-1 to WD-300, were not involved in the former appeal and not adjudicated by our judgment; therefore its counsel say that the court should have admitted the proffered evidence to identify the specific meters acquired. We held that those meters belonged to Shaw and directed Duncan Meter Corporation to deliver them to him forthwith. That decision was clear, unambiguous and binding upon all the parties to the proceeding. If the identification of the meters levied upon was of such paramount importance as Duncan Meter Corporation now claims, it could have presented the question to us in several ways: (1) by raising the point in the briefs filed that the "340 Miller Multiple Coin Parking Meters," which were ordered by the Municipal court to be turned over to the bailiff for the use of the attaching creditors, included the meters designated as WD-1 to WD-300, which were always claimed by Shaw; (2) by making the execution and levy and the return thereof a part of the record on appeal through the filing of a praecipe for such additional parts of the record as it desired, in accordance with rule 1 of the Appellate Court Rules, after notice of appeal was served on the parties June 13, 1940; or (3) it could have raised the question in the Appellate court by motion while the cause was here pending. (See sec. 74, par. 198 of the Civil Practice Act, Ill. Rev. Stat. 1941, ch. 110; sec. 86-1/2, par. 210a, ch. 110, Ill. Rev. Stat. 1941, which provides that pleas may be had by way of motion, and rule 33 of the Appellate court which specifies the time and provides the manner in which the motion may be presented.) Duncan Meter Corporation could also have called to our attention and argued the defense now interposed that it was a gratuitous bailee and as such was relieved of liability for nondelivery of the bailment because the property was claimed by others and taken by the bailiff through process of law.

We feel impelled to hold that the hasty levy, in view

[illegible] as C-1 to V-[illegible], and [illegible] appeal and not [illegible] are [illegible] to [illegible] say that the [illegible] are [illegible] to identify the specific [illegible] matters [illegible] to [illegible] to [illegible] to relieve them to [illegible]. [illegible] unmeritorious [illegible] claim to be [illegible]. If the identific[illegible] of [illegible] permanent importance [illegible] it would have [illegible] (1) by raising the point in the [illegible] the [illegible] multiple joint [illegible] court to be tried [illegible] of the [illegible] creditors, [illegible] C-1 to C-10, which were always claimed by [illegible] and the return thereof [illegible] filing of a petition [illegible] it desires, in accordance [illegible] after notice of [illegible] motion [illegible] (3) it could have [illegible] motion while the [illegible] of the Civil Procedure [illegible] 86-1/2, par. [illegible] that place may be [illegible] appellate court [illegible] in which the motion may be [illegible]. [illegible] could also have [illegible] to interpose the [illegible] relieved of liability [illegible] the property [illegible] through process of law.

The [illegible] to note [illegible] view

of an impending appeal, of which all the parties to that proceeding were fully aware, was a concerted effort on the part of Duncan Meter Corporation to defeat Shaw of his right to the designated meters, and its failure to bring the transactions involved to our attention indicates that the plan was devised and hurriedly carried out for the very purpose of building up the defenses which are now sought to be interposed. In good conscience it should not now be heard to raise these propositions.

The law is well settled in Illinois that questions of law which have been decided on appeal will not be again considered on a second appeal; that they are binding not only on the trial court in the further progress of the cause but also on the Appellate court in any subsequent appeal. People v. Militzer, 301 Ill. 284. And where a fact material to the determination of the cause has been adjudicated in a former suit before a court of competent jurisdiction and the same question is again at issue between the parties, its adjudication in the first cause will be conclusive. Reilley v. Agricultural Ins. Co., 311 Ill. App. 562, citing numerous Illinois decisions. It is likewise well settled in this state that the "rule of res judicata embraces not only what actually was determined in the former case between the same parties or their privies, but it extends to any other matters properly involved which might have been raised and determined." (Italics ours.) Phelps v. City of Chicago, 331 Ill. 80, citing cases. We have found that the 300 designated meters belonged to Shaw and directed that they be returned to him forthwith. The transactions by which Duncan Meter Corporation claims to have acquired those meters were directly involved in the litigation on the first appeal and Duncan Meter Corporation had full knowledge of that fact when Shaw filed his brief. It could then have brought the matter to our attention by one of the methods heretofore indicated and also interposed the defense

of an impending appeal, of which all the parties to that proceeding were fully aware, was a concerted effort on the part of Duncan Meter Corporation to defeat Shaw of his right to the designated meters, and its failure to bring the transactions involved to our attention indicates that the plan was devised and hurriedly carried out for the very purpose of building up the defenses which are now sought to be interposed. In good conscience it should not now be heard to raise these propositions.

The law is well settled in Illinois that questions of law which have been decided on appeal will not be again considered on a second appeal; that they are binding not only on the trial court in the further progress of the cause but also on the Appellate court in any subsequent appeal. People v. Mittleman, 301 Ill. 284. And where a fact material to the determination of the cause has been adjudicated in a former suit before a court of competent jurisdiction and the same question is again at issue between the parties, its adjudication in the first cause will be conclusive. Bailey v. Agricultural Ins. Co., 311 Ill. App. 562, citing numerous Illinois decisions. It is likewise well settled in this state that the "rule of res judicata embraces not only what actually was determined in the former case between the same parties or their privies, but it extends to any other matters properly involved which might have been raised and determined." (Italics ours.) Phelps v. City of Chicago, 331 Ill. 80, citing cases. We have found that the 300 designated meters belonged to Shaw and directed that they be returned to him forthwith. The transactions by which Duncan Meter Corporation claims to have acquired these meters were directly involved in the litigation on the first appeal and Duncan Meter Corporation had full knowledge of that fact when Shaw filed his brief. It could then have brought the matter to our attention by one of the methods heretofore indicated and also interposed the defense

predicated upon its theory of being a gratuitous bailee. Notwithstanding the opportunity afforded to present those issues Duncan Meter Corporation remained silent, evidently speculating on the result of the appeal, and now seems to litigate matters which could and should have been raised and determined on the first appeal.

For the reasons indicated we think the trial judge properly limited the issues on the second trial to the value of the meters. Duncan Meter Corporation argues that the amount of the judgment was excessive. The question presented was the fair market value of the meters on November 28, 1941. Franks v. Matson, 211 Ill. 338. The Miller Parking meter is a patented article for which Duncan Meter Corporation is the exclusive distributor. A circular in evidence prepared by Duncan Meter Corporation shows that the meter is made in only one model, in one quality, at one price, namely, $65.00 F.O.B. Chicago, not installed, and William Koenig, secretary of the Duncan Meter Corporation, testified that he could not recall that Miller Meters were sold for less than $65.00. When the direct question as to whether he knew the fair market value of the meter in 1941 and 1942 was propounded, he answered that "We have sold [them] from $28 to $65." Donald F. Duncan testified that the fair market value of the meters to individuals was $28.00, but that it was always sold to municipalities for $65.00, the difference in price being an expenditure of $35.00 for commissions, carrying charges and service. The court evidently found the fair market value at $65.00, less $35.00 for commissions, etc., and fixed the price at $30.00. That figure is fairly established by the undisputed evidence, and we perceive no reason for holding that the amount is excessive.

Various other points are raised in counsel's briefs, but in view of our conclusions as to the controlling issues presented it will be unnecessary to discuss them. Accordingly,

predicated upon its theory of being a prevailing party. Not-withstanding the opportunity afforded to present such issues Duncan Meter Corporation remained silent, evidently speculating on the result of the appeal, and now seeks to litigate matters which could and should have been raised and determined on the first appeal.

For the reasons indicated we think the trial judge properly limited the issues on the second trial to the value of the meters. Duncan Meter Corporation argues that the amount of the judgment was excessive. The question presented was the fair market value of the meters on November 2, 1941. Franks v. Watson, 211 Ill. 340. The miller metering meter is a patented article for which Duncan Meter Corporation is the exclusive distributor. A circular in evidence prepared by Duncan Meter Corporation shows that the meter is made in only one model, in one quality, at one price, namely, $67.00 F.O.B. Chicago, not installed, and William Koenig, secretary of the Duncan Meter Corporation, testified that he could not recall that Miller Meters were sold for less than $67.00. Upon the direct question as to whether he knew the fair market value of the meter in 1941 and 1942 was proponents, he answered that he have sold [them] from $28 to $67. Donald C. Duncan testified that the fair market value of the meters to individuals was $28.00, but that it was always sold to municipalities for $67.00, the difference in price being an expenditure of $39.00 for commissions, carrying charges and service. The court evidently found the fair market value at $67.00, less $39.00 for commissions, etc., and fixed the price at $28.00. That figure is fairly established by the unimpeached evidence, and we perceive no reason for holding that the amount is excessive.

Various other points are raised in commendable briefs, but in view of our conclusions as to the controlling issues presented it will be unnecessary to discuss them. Accordingly,

the judgment of the Superior court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan and Scanlan, JJ., concur.

the judgment of the superior court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan and Scanlan, JJ., concur.

42664

IN THE MATTER ~~OF THE~~ ESTATE OF FRANK DOMBROWSKI, ~~an~~ alleged incompetent person.

FRANK DOMBROWSKI,

Appellant.

321 I.A. 200

) APPEAL FROM CIRCUIT

) COURT, COOK COUNTY.

229789

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On April 5, 1941 Bernard Dombroski, Helen Halloran and Edith Wolanin filed their verified petition in the Probate court alleging that their father, Frank Dombrowski, because of old age, physical incapacity and mental deterioration, had become incompetent and was therefore incapable of managing his person and estate, and asking that a conservator be appointed of his estate which consisted of real and personal property aggregating some $34,000, with a gross annual income of $2,700. Pursuant to a hearing in the Probate court the petition was denied. Thereafter an appeal was prosecuted to the Circuit court, where trial by jury resulted in a disagreement. Judge Finnegan, who presided at the first trial in the Circuit court, immediately directed that another jury be impaneled, and the second trial before him resulted in two verdicts adjudging respondent to be an incompetent person, upon which judgment was entered, and from which respondent appeals.

At the time of the second trial in December 1942 respondent was 83 years of age. He was born in Danzig, Germany, or Poland, and had never learned to read or write. He came to the United States more than 50 years ago, subsequently returned to Europe, married there and later brought his wife to America. For 13 years they resided in Chicago and then moved to Calumet city. Eight children were born of the marriage, three of whom are dead. The other two surviving children, aside from petitioners, are Martha, who married Felix Von Bronk, and Walter Dombrowski.

IN THE MATTER OF THE GUARDIANSHIP OF
FRANK DOMBROWSKI, an alleged
incompetent person.

FRANK DOMBROWSKI,

petitioner,

MR. PRESIDING JUSTICE [illegible]:

On April [illegible], [illegible] commenced [illegible] in the Probate Court of Cook County, [illegible] petition [illegible] alleging that the [illegible], Frank Dombrowski, because of old age, physical infirmity and mental [illegible], had become incompetent and was therefore [illegible] of his person and estate, and asking that a guardian be appointed of his estate which contained [illegible] property [illegible] the sum of $34,000, with a [illegible] income of $[illegible]. Pursuant to a hearing in the Probate Court [illegible] Thereafter an appeal was [illegible] to the Circuit Court, where trial by jury resulted in a [illegible]. [illegible] presented at the [illegible] in the Circuit Court, [illegible] directed the [illegible] before the [illegible] trial [illegible] be an incompetent person, upon which judgment [illegible] and from which respondent appeals.

At the time of the [illegible] trial in [illegible] respondent was 83 years of age. [illegible] Germany, or [illegible] He came to the United States [illegible] quently returned to Europe [illegible] his wife to America. [illegible] and then moved to Detroit, [illegible] the marriage, three of whom [illegible] children, [illegible] Von Brown, [illegible]

Respondent's principal occupation during his lifetime was that of a hod carrier. About 20 years prior to the trial he suffered a cerebral thrombosis, or stroke, which necessitated his retirement. Thereafter his affairs, both business and personal, were managed by his wife Lucy Dombrowski, who died in July 1940. After her death his daughter, Edith Wolanin, assumed the management of his person and property for a period of approximately eight months. In January 1941 another daughter, Martha Von Bronk, after forcibly ejecting Edith from the premises pursuant to an altercation with her, and who according to Edith's testimony was a stranger in the household of her parents, assumed management of both the person and property of respondent. Shortly after she moved into the parental home, Martha drove respondent to the office of an attorney, where deeds were executed conveying to Martha and her father as joint tenants, titles to all of respondent's real estate, which at the time was valued at approximately $25,000. The following April Martha and her husband Felix took respondent to the office of one William Raddatz where the sale of a mortgage in the sum of $3,000 was negotiated, and in December 1941 another mortgage in the amount of $4,000 was sold by respondent upon the advice of Martha. Both Martha and her husband testified that proceeds of those sales were turned over to respondent and that they did not see them afterward. Nevertheless both checks were indorsed by the Von Bronks and the proceeds evidently were retained by them. One check for $4,000 was traced to the personal account of Martha and her husband in the East Side Trust and Savings Bank. In June 1941 a mortgage of the Von Bronk property given to secure the payment of a note in the amount of $5,500, executed by the Von Bronks, was released and the note canceled. Petitioners contend that this note and mortgage were taken by Martha from the personal effects of her father and a release thereof effected without payment of any consideration.

—3—

Respondent's [illegible]
was that of a [illegible]
[illegible]
his retirement. [illegible]
personal, were [illegible]
Jail, Lyon. [illegible]
the management of his [illegible]
mostly light [illegible]
Von Trong, [illegible]
sumit to an [illegible]
testimony was a [illegible]
management [illegible]
after she moved into the [illegible]
to the office of an attorney, [illegible]
to [illegible] and her father [illegible]
respondent's real [illegible]
approximately [illegible]
husband Tinka [illegible]
[illegible]
negotiator, and in [illegible]
of $4,000 was [illegible]
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attorney. [illegible]
Tronka and the [illegible]
check for $4,000 was [illegible]
and her husband in the [illegible]
June 1941 a mortgage [illegible]
the payment of a note [illegible]
Von Tronka, [illegible]
contend that this note [illegible]
the personal [illegible]

The record consists of more than 800 pages. The jury heard the testimony of some 50 witnesses, including the conflicting opinions of 11 experts and 24 laymen, as to respondent's mental competency, and many exhibits were introduced in evidence. In general the medical experts agreed that as the result of a stroke sustained some 20 years before the trial respondent suffered a paralysis of the right leg and arm, an atrophy of the tongue due to disuse over a long period of years, which, together with his meager education and inability to speak any language except his native tongue, rendered him somewhat inarticulate; a varying blood pressure which indicated hardening of the arteries; an inelasticity of portions of his lungs; hypertension, heart disease, a large scrotal hernia, marked osteoarthritis, generalized residual paralysis and residual paralysis of his facial muscles. His physical deterioration made him bedridden for a considerable period preceding the trial. One of the physicians thought that he could be brought to court on a stretcher, but others advised against it because of his condition. He appeared at the trial "in a wheel chair, on a stretcher in a semi-reclining position." The record leaves no room for doubt that he was so physically incapacitated as to be unable to look after his person. With respect to his mental competency the respective psychiatrists who examined him, made tests as to his ability to orient himself to time, place and persons, to do simple arithmetical problems, to comprehend questions logically, and to ascertain his knowledge of general matters pertaining to his estate and the events of his life. They were about evenly divided in their opinions as to his mental competency, his ability to transact ordinary business and to manage his estate. There was likewise a sharp conflict in the testimony of the various lay witnesses who testified for the respective parties. Basing their opinions upon their acquaintance and contacts with him over a period of years, some thought that he was mentally

His record [illegible] of [illegible]. The jury heard the testimony of some 20 witnesses, including the conflicting opinions of [illegible] as to his mental competency, and [illegible] indicated in evidence. In general the medical opinion agreed that [illegible] of a stroke sustained some [illegible] before the [illegible] suffered a paralysis of [illegible] the tongue [illegible] over a long period of years, [illegible] together with his [illegible] to [illegible] his language except his [illegible] inarticulately; a [illegible] of the arteries; an inability [illegible] tension, heart [illegible], [illegible] arteriosclerotic, generalized vascular [illegible] of his facial muscles. [illegible] bendidon for a certain [illegible] trial. One of the physicians [illegible] to court on [illegible], but [illegible] tion. He [illegible] in a semi-[illegible] position." The record [illegible] doubt that he was [illegible] to look after his person. [illegible] the respective [illegible] his ability to [illegible] simple [illegible] and to [illegible] his estate [illegible] his [illegible] divided in their opinions [illegible] mental competency, his ability to transact ordinary business [illegible] the subject. There was [illegible] in the testimony of the various lay witnesses [illegible] respective [illegible]. Basing their opinions upon their acquaintance and intercourse with him over a period of years, some thought they [illegible]

competent, able to transact ordinary business and look after his estate, while others were equally certain that his physical and mental deterioration rendered him utterly unfit to do so. The jury heard all this evidence, as well as the facts pertaining to the transfer and liquidation of his property almost immediately after Martha entered his household following the death of his wife in 1940. There was thus cast upon the jury the responsibility of determining from this mass of evidence whether respondent was an incompetent person as alleged in the petition, incapable of managing and controlling his estate and his person. From a careful examination of the record we are satisfied that the verdict is amply sustained by the evidence, and if the cause was otherwise fairly tried, we would not be warranted in disturbing the judgment entered in pursuance thereto.

One of the grounds urged for reversal is that the court erred in refusing to permit two lay witnesses, Judge Cecil C. Smith of the Municipal court and Henry L. Kiajewski, an attorney, to express an opinion as to respondent's mental condition. Martha Von Bronk had removed from respondent's home a grandfather's clock which had previously been willed to Edith by her mother, and Edith sought to replevin the clock from her sister Martha. The suit came on for trial before Judge Smith. When called as a witness in this proceeding, more than a year after the replevin suit was heard, he testified in substance that in October 1941 respondent appeared as a witness in that cause; that he had never met him before; and that he spoke to him in chambers through an interpreter for some 20 or 30 minutes in an effort to adjust the litigation between the parties. With that conversation as a basis, Judge Smith was asked whether he had an opinion as to respondent's competency to transact the usual and ordinary affairs of business. The trial judge sustained the objection of petitioners' counsel because he was of the opinion that

no foundation had been laid for such an opinion. Kiajewski first met respondent at his office in October 1941, where he was also introduced to Mrs. Von Bronk who accompanied him there to execute a codicil to his will. On that occasion Kiajewski acted as a witness to respondent's signature and "simply passed the time of day to Dombrowski." He next met him two weeks later in the Municipal court in the replevin proceeding and was present in the judge's chambers along with the parties to the suit, acting as an interpreter for Judge Smith and Dombrowski for about 15 to 20 minutes. Presumably all this conversation had to do with the grandfather's clock; it had no relation to respondent's estate or business affairs. Based upon that second meeting, Kiajewski's opinion was asked as to respondent's competency and his ability to transact the usual and ordinary business affairs. Again the court sustained the objection interposed by petitioners' counsel on the ground that there was no proper foundation for such an opinion.

The authorities are generally in accord that whether a lay witness has sufficient knowledge of another to express an opinion on his mental condition is to be determined by the court, that such a witness "<u>may detail facts and circumstances</u> from which the jury may form an opinion and then give his own conclusion in the form of an opinion" (italics ours), that such an opinion is to be taken by the jury for what it is worth, and that from the nature of things no rule can be laid down declaring the extent of acquaintance or the opportunities necessary to enable an observer to be a witness. <u>Martin v. Beatty</u>, 254 Ill. 615, citing cases. <u>Graham v. Deuterman</u>, 244 Ill. 124, is to the same effect. Judge Smith testified to the conversation that he had with respondent and Kiajewski stated that he answered questions intelligently, but since neither of them was asked nor stated what the nature of the

no foundation has been laid for a [illegible]. I proceed first met respondent at his office in [illegible], where he was also introduced to me. [illegible] to execute a [illegible] to do with. [illegible] acted as a witness to [illegible] the time of day to [illegible]. [illegible] in the municipal court in the [illegible] in the judge's chambers along with [illegible] acting as an interpreter for [illegible] about 15 to 20 minutes. Presumably [illegible] to do with the [illegible] respondent's estate or business affairs. [illegible] second meeting, [illegible] competency and his ability to transact the [illegible] business affairs. Again the [illegible] interposed by petitioner's counsel [illegible] was no proper foundation for [illegible] opinion.

The authorities are generally in accord that [illegible] a lay witness has sufficient [illegible] an opinion on his mental [illegible] court, that such a witness may [illegible] from which the jury may [illegible] conclusion in the form of an opinion. [illegible] an opinion is to be taken as [illegible] and that from the nature of things no rule [illegible] declaring the extent of such knowledge [illegible] necessary to enable an observer to be a witness. [illegible] Beatty, 254 Ill. 67, citing cases. [illegible] Ill. 174, is to the same effect. [illegible] the conversation [illegible] stated that he answered questions [illegible] neither of them [illegible]

questions and answers was, nor discussed respondent's conduct or demeanor upon that hearing, their answers would be merely conclusions as to his intelligence. Because the question whether a witness has sufficient knowledge of another to express an opinion is a matter to be determined by the court, the judge is required to exercise his discretion in determining whether the lay witness is competent to give an opinion, and unless it appears that he has abused his discretion, no reversible error is committed. Moreover, the opinions of Judge Smith and Kiajewski would have been merely cumulative of those of the numerous other lay witnesses, and it is highly improbable that in view of the meager opportunity afforded them to judge respondent's competency, their opinions would have influenced the verdict.

It is next urged that over the objection of respondent's counsel the court admitted in evidence the original petition filed in the Probate court, permitted it to be read to the jury and taken with them during their deliberations. The petition, under oath, alleged, inter alia, that respondent "is wholly incapable of managing his estate and is incompetent, in that: because of old age, physical incapacity, and imperfection and deterioration of mentality, he is incapable of managing his person and estate." It appears from the record that the petition was received in evidence pursuant to answers elicited from Edith Wolanin, one of the petitioners, on cross-examination by respondent's counsel, that she had signed the petition for the appointment of a conservator and "supposed she read it." Respondent argues that the purpose of the question was merely to show that she was interested in the litigation. If this had been the sole purpose of the question, the result would have been accomplished when she stated that the petition bore her signature, but counsel persisted in asking her whether or not she had read it. Petitioners' attorneys argue that the purpose of the question was to leave with the jury an impression

questions [illegible] not [illegible] [illegible] not
or [illegible] [illegible] [illegible]
conclusions [illegible] the [illegible] [illegible]
whether a witness [illegible] [illegible] to [illegible]
an opinion [illegible] [illegible]
is [illegible] to [illegible] [illegible]
the jury [illegible] [illegible]
appears that [illegible] [illegible]
in [illegible] [illegible]
would have been [illegible] [illegible]
jury witnesses, [illegible] [illegible]
moger [illegible] [illegible]
their opinions [illegible] [illegible].

It is [illegible] [illegible]
counsel the court [illegible]
filed in the [illegible] court, [illegible]
and taken [illegible]
[illegible] oath, [illegible]
[illegible] of [illegible]
[illegible] of [illegible]
deportation of [illegible], he [illegible]
person and [illegible]
was received in [illegible]
[illegible], one of [illegible]
responsible [illegible]
appointment of a [illegible]
Report [illegible]
to also [illegible]
had been the sole purpose of [illegible] [illegible]
been [illegible] [illegible]
signature, but counsel [illegible]
she had read it. [illegible]
purpose of the question [illegible]

that there was something irregular on the face of the petition, and it was evidently for that reason that the court admitted it in evidence. Although it is not considered good practice to permit jurors to take the pleadings with them to the jury room in civil cases, because they are merely self-serving statements, it has been held that there can be no just ground for complaint where the evidence objected to is brought into the case through cross-examination of a witness by counsel who later insists that the evidence is improper. Capen et al. v. De Steiger Glass Co., 105 Ill. 185. Moreover, the petition contained nothing more than the allegations of the petitioners that respondent was incapable of managing his estate and incompetent because of old age, physical incapacity and mental deterioration. These were the very issues upon which the jury was required to pass, and, in view of the mass of testimony that was adduced upon the subject, the mere allegations in the petition could not have prejudiced respondent's case.

The remaining ground urged for reversal is that it was error for the court to submit to the jury the question as to respondent's mental condition during a prior period, the length of which, in years, was left for the jury to determine. The jury filled in the blank before the word "years" by inserting the figure "20" and also returned another verdict finding that respondent "is incapable of managing and controlling his person." Respondent's present counsel (who were not the attorneys when the case was tried) argue that the only triable issue was respondent's mental competency at the time of the hearing and that it was error to require the jury to determine his competency at any time prior to the trial. We agree with that contention. However, that part of the signed verdict which reads as follows: "We, the undersigned Jurors in the case of Frank Dombrowski,

that there was something irregular on the face of the petition, and it was evidently for that reason that the court admitted it in evidence. Although it is not considered good practice to permit jurors to take the pleadings with them to the jury room in civil cases, because they are merely self-serving statements, it has been held that there can be no just ground for complaint where the evidence objected to is brought into the case through cross-examination of a witness by counsel who later insists that the evidence is improper. Capen et al. v. De Steiger Glass Co., 105 Ill. 187. Moreover, the petition contained nothing more than the allegations of the petitioners that respondent was incapable of managing his estate and incompetent because of old age, physical incapacity and mental deterioration. These were the very issues upon which the jury was required to pass, and, in view of the mass of testimony that was adduced upon the subject, the mere allegations in the petition could not have prejudiced respondent's case.

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alleged to be an incompetent person, having heard the evidence in the case, find from such evidence that the said Frank Dombrowski is an incompetent person; that he is a resident of said Cook County, and is incapable of managing and controlling his estate," is responsive to the only issue in the case. The verdict then proceeds to find "that he is aged about 83 years and has been in such condition for a period of about 20 years prior to this date." Counsel's criticism is leveled at this part of the verdict. Undoubtedly it would have been better if the concluding clause had been omitted, but we think it may be treated as surplusage and not prejudicial to the extent that the judgment order entered upon the verdict should be reversed.

In conclusion it should be noted that prior to Lucy Dombrowski's death, she owned the mortgages and real estate belonging to her and respondent in joint tenancy with him, and of course respondent became the sole owner thereof upon the death of his wife. Petitioners' counsel argue, with considerable force, that in order to align one of the members of the family on her side of the controversy, Martha Von Bronk caused the preparation of a will which purported to bequeath and devise to her brother Walter Dombrowski one-half of respondent's estate upon his death, and that Walter, in expectation of the inheritance, joined Martha in opposing the appointment of a conservator, notwithstanding the fact, of which he was unaware until the date of the trial, that Martha had, through the conveyances heretofore recited, already possessed herself of her father's property, and that upon his death there would be nothing upon which the will might operate.

The circumstances already related with respect to the seizure by Martha of the grandfather's clock which had been willed to Edith by her mother, the conveyance of the real

alleged to be an incompetent person, having heard the evidence in the case, find from such evidence that the said Frank Dombrowski is an incompetent person; that he is a resident of said cook County, and is incapable of managing and controlling his estate," is responsive to the only issue in the case. The verdict then proceeds to find that he is aged about 83 years and has been in such condition for a period of about 20 years prior to this date." Counsel's criticism is leveled at this part of the verdict. Undoubtedly it would have been better if the concluding clause had been omitted, but we think it may be treated as surplusage and not prejudicial to the extent that the judgment order entered upon the verdict should be reversed.

In conclusion it should be noted that prior to Mary Dombrowski's death, she owned the mortgage and real estate belonging to her and respondent in joint tenancy with him, and of course respondent became the sole owner thereof upon the death of his wife. Petitioners' counsel argue, with considerable force, that in order to sign one of the members of the family on her side of the controversy, Martha Von Brunk caused the preparation of a will which purported to bequeath and devise to her brother Walter Dombrowski one-half of respondent's estate upon his death, and that Walter, in expectation of the inheritance, joined Martha in opposing the appointment of a conservator, notwithstanding the fact, of which he was aware until the date of the trial, that Martha had, through the conveyances heretofore recited, already possessed herself of her father's property, and that upon his death there would be nothing upon which the will might operate.

The circumstances already related with respect to the seizure by Martha of the grandfather's clock which had been willed to Edith by her mother, the conveyance of the real

estate to Martha in joint tenancy with her father, the rapid liquidation of the mortgages with appropriation of the proceeds therefrom by Martha and Felix Von Bronk, and Martha's physical encounter with and ejection of Edith from the home shortly after the mother's death, were all circumstances adduced in evidence which the jury was entitled to take into account in determining whether respondent, in view of his many ailments, was competent to freely give his consent to the transfers and liquidation of his property by Martha and her husband, to the exclusion of his other three children who, according to the evidence, were equally if not more closely attached to him than Martha.

The cause was fairly and fully tried and upon the record presented we are satisfied that the verdict of the jury reflects and supports the allegations of the petition. The judgment of the Circuit court is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan and Scanlan, JJ., concur.

estate to Martha in joint tenancy with her father, the rapid liquidation of the mortgages with appropriation of the proceeds therefrom by Martha and Felix von Brunk, and Martha's physical encounter with and expulsion of Ruth from the home shortly after the mother's death, are all circumstances adduced in evidence which the jury was entitled to take into account in determining whether respondent, in view of his many attributes, was competent to freely give his consent to the transfers and liquidation of his property by Martha and her husband, to the alienation of his other three children who, according to the evidence, were equally if not more closely attached to him than Martha.

The cause was fairly and fully tried on the record presented we are satisfied that the verdict of the jury reflects and supports the allegations of the petition. The judgment of the circuit court is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan and Keenan, JJ., concur.

42715

CITY OF CHICAGO, a municipal corporation,
Appellee,

v.

GREAT LAKES DREDGE & DOCK COMPANY, a corporation,
Appellant.

321 I.A. 300

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

230 290

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The City of Chicago brought suit against Great Lakes Dredge & Dock Company for damages to a cable used in the operation of a bridge over the Calumet river in Chicago. Plaintiff's claim is predicated on the alleged negligence of defendant in the navigation of a tug passing through the draw of the bridge in going up river with a scow load of steel in tow. Trial by the court without a jury resulted in a finding and judgment against defendant for $177.96 and costs, from which defendant appeals.

The essential facts disclose that plaintiff owned, maintained and operated a temporary bridge (which has since been replaced by a new one) known as Torrence Avenue Temporary Bridge over the Calumet river on Torrence avenue at 124th street. The river at and beyond this point is navigable and was used for navigation to a considerable extent. The river runs slightly northeast and southwest, the bridge extending north and south across the river.

The accident occurred September 4, 1937. The bridge was a pontoon-type. The south end of the opening span rested on a pier, to which it was attached by a ball and socket joint. The north end of the bridge floated on a pontoon or box of steel, which the witnesses referred to as a scow. The bridge was operated by two cables; when it was opened, the

42715

CITY OF CHICAGO, a municipal corporation,

Appellee,

v.

GREAT LAKES DREDGE & DOCK COMPANY, a corporation,

Appellant.

MR. PRESIDING JUSTICE FRANCIS DESMONT DELIVERED THE OPINION OF THE COURT.

The City of Chicago brought suit against Great Lakes Dredge & Dock Company for damages to a cable used in the operation of a bridge over the Calumet river in Chicago. Plaintiff's claim is predicated on the alleged negligence of defendant in the navigation of a tug passing through the arm of the bridge in going up river with a scow load of sand in tow. Trial by the court without a jury resulted in a finding and judgment against defendant for $17,750.00 and costs, from which defendant appeals.

The essential facts [illegible] were, [illegible] maintained and operated a temporary bridge [illegible] had been replaced by a new one. [illegible] Temporary Bridge over the Calumet river on Forrestville [illegible] street. The river at and beyond that point [illegible] was used for navigation to a [illegible] extent. The river runs slightly northeast and southwest, [illegible] north and south across the river.

The accident occurred [illegible], 1941. The bridge was a pontoon-type. The south end of the operating [illegible] on a pier, to which it was attached by a [illegible] hinge joint. The north end of the bridge [illegible] on a pontoon or box of steel, which the witnesses referred to as a scow. The bridge was operated by two cables; when it [illegible], the

one cable pulled the pontoon into a recess out of the way of navigation, and when it was closed the other cable would pull the bridge around into place. At the north end the cable was attached to the pontoon or scow; at the south end it was anchored to a clump of piling. When the bridge was open for the passage of vessels the cable was supposed to rest on the bottom of the river with all slack off the drum, so as to permit ships to pass over without being entangled by the cables. From a drawing introduced in evidence it appears that the channel through the draw of the bridge with the bridge open was 90 feet. At the north side of the channel there was a clump of piling about 15 feet west and 15 feet south of the bridge pontoon or scow. There was also a clump of piling on the south side of the channel a little farther west for the protection of the bridge approach. As the result of these two clumps of piling, the navigable channel was not the full 90 feet but was approximately 75 feet wide.

On the day in question defendant's tug "John F. Cushing," with a scow load of steel in tow, was going west up the river, and while passing through the draw her propeller caught and picked up the cable which was supposed to be on the bottom of the river. The cable became entangled in the propeller, making it necessary to cut the cable in order to release the tug. The "John F. Cushing" was 127 feet long with a 27-foot beam, and had a water draft of 16 feet. The depth of the river at that point was 21 or 22 feet.

The undisputed evidence is that the tug and tow were passing through the draw very slowly; in fact, they were drifting without any power, the engine having been stopped 100 feet back. Plaintiff's proof of negligence was based upon the testimony of William W. Bradwell, who had been a bridge tender in the City of Chicago for 27 years, and was in charge of the bridge when the accident occurred. He testified that "The cable was lying on the bottom of the river but was attached to a clump of piling

one cable pulled the pontoon into a recess off of the way of navigation, and when it was closed the other cable would pull the bridge around into place. At the north end the cable was attached to the pontoon or scow at the south end it was anchored to a clump of piling. When the bridge was open for the passage of vessels the cable was supposed to rest on the bottom of the river with all slack off the drum, so as to permit ships to pass over without being entangled by the cables. From a drawing introduced in evidence it appears that the channel through the draw of the bridge with the bridge open was 90 feet. At the north side of the channel there was a clump of piling about 15 feet west and 15 feet south of the bridge pontoon or scow. There was also a clump of piling on the south side of the channel a little farther west for the protection of the bridge approach. As the result of these two clumps of piling, the navigable channel was not the full 90 feet but was approximately 75 feet wide.

On the day in question defendant's tug "John V. Manning," with a scow load of steel in tow, was going east up the river, and while passing through the draw her propeller caught and picked up the cable which was supposed to be on the bottom of the river. The cable became entangled in the propeller, making it necessary to cut the cable in order to release the tug. The "John V. Manning" was 127 feet long with a 27-foot beam, and had a water draft of 16 feet. The depth of the river at the bridge was 11 or 12 feet.

The undisputed evidence is that the tug and tow were passing through the draw very slowly; in fact, they were drifting without any power, the engine having been stopped 150 feet back. Plaintiff's proof of negligence was based upon the testimony of William W. Bradwell, who had been a bridge tender in the city of Chicago for 27 years, and was in charge of the bridge when the accident occurred. He testified that "the cable was lying on the bottom of the river but was attached to a clump of piling

and ran through a sheave on the bridge scow. Then, it was on a drum at the other end. In order to let a vessel through, it was necessary to let the cable unwind from the drum. It drops down mostly by gravity, and after the bridge is open, you pull whatever slack is on the drum off so as to ride down as low as possible. That is the regular proceeding." He further testified that "After we had opened the bridge, which was the common procedure, taking whatever slack there was in the cable off the drum and it laid on the bottom of the river so that there would not be any chance of it catching, in the ordinary procedure, on the bottom. When the 'John F. Cushing' was passing through the draw, while the tug was going through the draw, they had the slack off on their line so as to let this scow load of steel in line with the coming channel that they were heading for, and the back of their tug kind of rode up on the corner of the scow and caused it to dip down and catch hold of this cable ***."

There is some conflict as to the position of the tug and tow as they were passing through the draw, and the manner in which they were navigated. The bridge was completely open. Bradwell testified that the tug and tow were not in alignment as they were passing through the draw and were not in the center of the channel, but that the tug was over toward the north bank of the river about 15 feet from the bridge pontoon, and that the tow was hooked on one side and was in the center of the channel with the tug pulling the tow from the side, and he stated that there was some maneuvering of the tug and scow to get them into alignment. However, it appears from the testimony of other witnesses that the maneuvering described by Bradwell occurred after the cable had fouled the propeller, and it may well be that this threw the tug and tow out of alignment, as described by him. Two of defendant's witnesses, Maurice Welch, engineer of the tug, and Jerry Mulvaney, who

and ran through a sheave on the bridge deck. Then, it was on a drum at the other end. In order to let a vessel through, it was necessary to let the cable unwind from one drum. It drops down mostly by gravity, and after the bridge is open, you pull whatever slack is on the drum off so as to pile down as low as possible. That is the regular procedure. He further testified that "After we had opened the bridge, which was the common procedure, taking whatever slack there was in the cable off the drum and it laid on the bottom of the river so that there would not be any chance of it catching, in the ordinary procedure, on the bottom. When the 'John T. Crabtree' was passing through the draw, while the tow was going through the draw, they had the slack off on their line so as to let this scow load of steel in line with the coming channel that they were heading for, and the back of their tug kind of rode up on the corner of the scow and caused it to dip down and catch hold of this cable ***."

There is some conflict as to the position of the tug and tow as they were passing through the draw, and the manner in which they were navigated. The evidence was completely open. Bradwell testified that the tug and tow were not in alignment as they were passing through the draw and were not in the center of the channel, but that the tug was over toward the north bank of the river about 1½ feet from the bridge pontoon, and that the tow was hooked on one side and was in the center of the channel with the tug pulling the tow from the side, and he stated that there was some maneuvering of the tug and scow to get them into alignment. However, it appears from the testimony of other witnesses that the maneuvering described by Bradwell occurred after the cable had fouled the propeller, and it may well be that this threw the tug and tow out of alignment, as described by him. Two of defendant's witnesses, Maurice Welch, engineer of the tug, and Jerry Mulvaney, who

was on the deck aft where he could see what was going on, both testified that the tug and tow were in line, with the scow tied behind the stern of the tug with very short lines, not more than two feet between them; that there was no maneuvering of the tug or scow to get them in alignment while passing through the draw until after the cable got in the wheel; and that they passed through the draw about the center of the channel. Welch stated that the engine was stopped until they got through the draw, and after he got the signal to go ahead, he had gone only a few feet when he felt the cable in the propeller.

Plaintiff was forced to rely solely on Bradwell's testimony to sustain its charge of negligence. Its claim is founded on the allegation that defendant "so negligently and carelessly operated its *** [tug and tow] that it collided with said property with great force and violence; and as a direct and proximate result thereof, said property was damaged." The essence of the charge is that defendant was guilty of faulty navigation in the channel. Even assuming that defendant's servants had some difficulty in maneuvering the tug through the draw, there is no evidence that the accident occurred as the result of that circumstance. Bradwell's explanation and his statement on redirect examination that the "contact with this cable and entangling it by the propeller of the tug took place during the realignment of the scow," was nothing more than his theory of how the accident happened, but it could not have occurred in the manner he described. His statement that "the back of their tug kind of rode up on the corner of the scow and caused <u>it</u> to dip," is susceptible of only one meaning, that the scow or pontoon, which was a floating box of steel, dipped when the stern of the tug rode up on it, and not that the stern of the tug dipped when that occurred. There was a five or six-foot clearance between the tug and the bottom of the river. All the witnesses testified that the cable was

was on the deck aft where he could see [illegible], both testified that the tug and tow were in line, that the [illegible] behind the stern of the tug with very short [illegible], [illegible] two feet between them; that there was no [illegible] of the rig or scow to get them in alignment while passing through the draw until after the cable got in the wheel; and that they passed through the draw about the center of the channel. [illegible] that the engine was stopped until they got through the draw, and after he got the signal to go ahead, he had gone only a few feet when he felt the cable in the propeller.

Plaintiff was forced to pay [illegible] testimony to sustain the charge of negligence. The claim is founded on the allegation that defendant [illegible] and carelessly operated its [illegible] [tug and tow] that it collided with said property with great force and violence, and as a direct and proximate result thereof, said property was damaged." The essence of the charge is that [illegible] navigation in the channel. Even [illegible] vents had some difficulty in maneuvering the rig through the draw, there is no evidence that the [illegible] result of that circumstance. Personally [illegible] statement on redirect examination that the [illegible] cable and entangling it by the propeller of the [illegible] during the realignment of the scow," was nothing [illegible] theory of how the accident happened, but it could [illegible] occurred in the manner he describes. His testimony [illegible] back of their tug kind of rode up on the [illegible] and caused it to dip," is susceptible of only one meaning, that the scow or pontoon, which was a flat-bottom box or [illegible], dipped when the stern of the tug rode up on it, and not that the stern of the tug dipped when the [illegible]. There was a five or six-foot clearance between the tug and the bottom of the river. All the witnesses testified that the cable was

supposed to lie on the bottom. If it had been suspended plaintiff would have been the negligent party because that would have clearly constituted an obstruction to navigation, for which plaintiff would be liable. Clement v. Metropolitan West Side Elev. Ry. Co., 123 Fed. 271; Southern Transportation Co. v. Philadelphia, Baltimore & Washington R. Co., 196 Fed. 548, aff'd, 205 Fed. 732; North American Dredging Co. v. Pacific Mail S. S. Co., 185 Fed. 698. Therefore, assuming that the cable lay on the bottom of the channel, the stern of the tug would have had to dip some five feet in order to intercept it. There is no evidence to support such a claim, and Bradwell's testimony does not indicate that it could have happened in that manner.

In view of these conclusions it will be unnecessary to discuss errors assigned because of the exclusion and admission of certain evidence; and it is likewise unnecessary to pass upon the damages assessed.

Since the cause was tried by the court without a jury, it would serve no useful purpose to remand it for a new trial. Accordingly, the judgment is reversed.

JUDGMENT REVERSED.

Sullivan and Scanlan, JJ., concur.

supposed to lie on the bottom. If it had been anchored plain-tiff would have been entitled perhaps because that would have clearly added protection to navigation, for which plaintiff would be liable. Clement v. Metropolitan Gas Light Co., 76 Ga. 502 (1886); Southern Transportation Co. v. Philadelphia, Baltimore & Washington R. Co., 196 Fed. 248, affd. 205 Fed. 787; North American Transportation Co. v. Pacific Mail S. S. Co., 189 Fed. 992. Therefore, assuming that the cable lay on the bottom of the channel, the crew of the car would have had to dip some five feet in order to intercept it. There is no evidence to support such a claim, and Trowbridge's testimony does not indicate that it could have happened in that manner.

In view of these considerations it will be unnecessary to discuss errors assigned because of the admission and exclusion of certain evidence; and it is likewise unnecessary to pass upon the damages assessed.

Since the cause was tried by the court without jury, it would serve no useful purpose to remand it for a new trial. Accordingly, the judgment is reversed.

JUDGMENT REVERSED.

Sullivan and Seaman, JJ., concur.

42775

321 I.A. 301

MORRIS INVESTMENT COMPANY, a corporation, Appellant,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
KATHRYN WEAVER and CHICAGO TITLE & TRUST COMPANY, a corporation, Appellees.	)	

231-294

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree of the Superior court overruling its exceptions to a master's report, approving the findings and recommendation of the master before whom a hearing was had upon the merits, and dismissing the complaint for want of equity.

There is no dispute as to the following salient facts: by written contract dated November 21, 1938, plaintiff agreed to sell and the principal defendant, Kathryn Weaver, agreed to purchase a parcel of improved real estate located at 4145-47 Indiana avenue, Chicago, for the stipulated price of $14,500. The succeeding day the parties entered into an escrow agreement with the Chicago Title & Trust Company whereby the purchaser, Kathryn Weaver, deposited with the escrowee the sum of $3,000 and agreed to pay thereafter the sum of $200 a month until an aggregate of $7,200 had been paid on account of the purchase price. When these payments had been completed she was to receive a deed to the property, upon the execution and delivery to the escrowee of a first mortgage for $7,300. Taxes on the property had been delinquent for several years through 1937, and under the written directions given the escrowe the delinquent taxes were to have been paid or otherwise removed by plaintiff, the seller, within 30 days after the recording of the deed, and if plaintiff failed to pay or otherwise remove the tax lien the escrowee was empowered and directed to indorse

a credit on the note secured by the $7,300 mortgage in an amount equal to the taxes and accrued interest, provided title was otherwise acceptable. Defendant paid sufficient monies to entitle her to a deed by September 1, 1940, and accordingly the deed was delivered and recorded. On February 4, 1941 the escrowee, pursuant to the demand of defendant's attorneys and in accordance with the provisions of the escrow agreement, indorsed the mortgage note with the full amount of the taxes, penalties and interest then due, aggregating $3,349.01.

The controversy arises over plaintiff's claim that after Kathryn Weaver became entitled to her deed on September 1, 1940 she entered into an oral agreement with plaintiff on October 15, 1940, which allegedly modified the original written escrow agreement in the following respects: plaintiff, which had obligated itself to pay or otherwise remove the delinquent taxes within 30 days after the recording of the deed, was to effect, if possible, a reduction in the amount of taxes, penalties, interest and forfeiture costs through negotiation and court proceeding; that in order to enable it to effect such reduction, defendant agreed to extend the time limitation for the payment or disposition of taxes to July 24, 1941; and that the alleged undertaking was in consideration of plaintiff's accepting a junior mortgage to enable it to make a loan. With respect to the proposed oral agreement the complaint alleges that at the time it was made plaintiff advised defendant that it would employ an attorney on a fee basis to institute proceedings against the county to foreclose the lien for delinquent taxes and would cause its nominee to bid at the sale of the property such sum as the county agreed to accept and which plaintiff subsequently "guaranteed" at $1,500; that it retained attorneys on a contingent basis, who instituted foreclosure proceedings based on a minimum bid at the sale of $1,500 and who procured a decree which contained a finding that the total amount of

[illegible]

[illegible] equal to the [illegible] was [illegible] to [illegible] 1. The [illegible] the [illegible] 1, [illegible] accounts, [illegible] in accordance with the [illegible] the mortgage [illegible] and interest then due, [illegible].

The [illegible] over [illegible] after February leaves [illegible] on September 1, 1940, she entered into an [illegible] on October 1, 1940, [illegible] section agreement in the following [illegible] had obligated itself to pay or otherwise [illegible] terms within 30 days after the [illegible] to effect, if possible, a [illegible] tion, interest and [illegible] proceeding; that in order to [illegible] defendant agree to [illegible] or disposition of [illegible] modification was in [illegible] junior [illegible] the purpose of [illegible] time it was [illegible] employ an attorney [illegible] against the [illegible] and could [illegible] such as in the [illegible] subsequent [illegible] on a monthly [illegible] based on a [illegible] a degree which [illegible]

taxes due through 1937 was $3,258.80; that at the sale held pursuant to the entry of the decree defendant, notwithstanding her purported agreement "and with intent to defraud and cheat this plaintiff, caused a bid in the amount of Fifteen Hundred ($1,500.00) Dollars to be made and accepted by the County collector," and thereafter "with intent to defraud and cheat the plaintiff, the defendant caused the Chicago Title & Trust Company to reduce the said note abovementioned by a sum of Thirty-three Hundred Forty-nine Dollars and one cent ($3,349.01), apparently being the purported amount due for taxes;" that "by reason of the above and foregoing the said sum of Fifteen Hundred ($1,500.00) Dollars had been paid for the delinquent taxes and this amount should have, if any at all, been noted upon said note instead of Thirty-three Hundred Forty-nine Dollars and one cent ($3,349.01);" that the defendant "pursuant to her fraudulent scheme and device, caused the Chicago Title & Trust Company to indorse the deduction of $3,349.01 upon said note on February 4, 1941, knowing full well that on February 11, 1941 the said defendant was to bid $1,500.00 or cause said amount to be bid at the said foreclosure sale, contrary to the terms of said agreement of the parties and with intent to defraud and cheat the plaintiff of the difference between $3,349.01 and $1,500, or $1,849.01;" that said defendant, "having knowledge of all allegations hereinabove and having knowledge of the basis of said foreclosure suit as above set forth has by all of her acts and doings herein alleged unjustly enriched herself in the amount of Eighteen Hundred Forty-nine Dollars and one cent ($1,849.01) by causing the said note to be reduced in said sum of $3,349.01, all pursuant to said defendant's contrivance to fraudulently defraud this plaintiff." The relief sought in the complaint is the reformation of the mortgage note by changing the indorsement thereon of February 4, 1941 in the amount of

[illegible]

$3,349.01 to $1,500.

By concession of the parties the principal question presented is whether the evidence adduced upon the hearing before the master would warrant a finding that an oral agreement, such as is alleged in the complaint, amending the original escrow agreement between the parties, was actually made. Upon this question the parties adduced considerable evidence. Harold Shlensky, who was associated with plaintiff, testified in substance that he sold the property under contract to Kathryn Weaver, that he knew Robert Cole, an assistant escrow officer of the Chicago Title & Trust Company, who handled the transaction, and Charles Jenkins, who represented Mrs. Weaver when she purchased the property. He met Mrs. Weaver and Jenkins in his office in October 1940. The property had then been paid down to $7,300 and Mrs. Weaver was entitled to a deed under the contract. He stated that Mr. Jenkins, speaking on behalf of Mrs. Weaver, said that she would execute a mortgage back but could not afford to pay $200 a month, and that she would wait until July 1941 to enable Shlensky to clear up the taxes if he would reduce the payments to $100 a month. Shlensky testified that he then told Jenkins and Mrs. Weaver that he would pay the taxes or cause a tax foreclosure to be filed, but that it would take from four to six months to do so, and he claims that the parties then agreed to extend the time to July 1941; that he then submitted the case to his attorneys for attention and made arrangements for a reduction of the back taxes to $1,500, which was the amount to be paid at the foreclosure sale. Thereafter James Deming was substituted for Jenkins as Mrs. Weaver's attorney, and Shlensky says that he met him about January 20, 1941. Mrs. Weaver was also present. Previously Deming, during a telephone conversation, had told Shlensky that the escrowee insisted on written instructions relative to the extension agreement and Cole had informed Shlensky that unless a written document was

procured and submitted to the escrowee, the Chicago Title & Trust Company would have to credit the note for all the taxes then due. Shlensky stated he and Deming discussed a modification in writing such as the escrowee required; that at the same time he told Deming that a tax foreclosure proceeding had already been instituted and that a sale would take place shortly; that Deming then told him that although Mrs. Weaver had agreed to pay $100 a month, she could not pay more than $50, and "so we compromised" for $65; that following this conversation they agreed in Cole's presence to draw up a modification agreement, which was presented to Cole the following day. The agreement submitted, which was received in evidence as plaintiff's exhibit 1, was considered by Cole to be ambiguous and the parties were to meet again the following day. Shlensky testified that Deming did not appear and that he thereafter received a call from Cole advising him that defendant had directed the escrowee to credit the full amount of the taxes on the mortgage note.

Robert Cole, when called as a witness by plaintiff, testified that his file was silent as to the extension, but he recalled a meeting in January 1941 with Deming and Shlensky, who discussed modification of the escrow in his presence. He recalled plaintiff's exhibit 1 and said that the Title & Trust Company had refused to accept it because it had contained improper instructions to the escrowee, and thereafter his firm received a demand and made the indorsement as to the amount of taxes authorized by the original escrow agreement.

Charles Jenkins, testifying on behalf of defendant, said he recalled a conversation with Shlensky in September 1940 in which the latter offered to place a second mortgage on the Weaver property, to deduct $300 from the note, and assume cleaning up the taxes prior to 1938, but that on behalf of Mrs. Weaver he refused the offer; that he told Shlensky that "we had been trying for over 1-1/2 years to make arrangements and

processed and [illegible]
company again have to [illegible]
bilaneay [illegible]
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fied that Deering will not [illegible]
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to credit the full amount of [illegible]

About July, [illegible]
fied that his file was [illegible]
a meeting in January 1941 [illegible]
modification of the escrow [illegible]
exhibit 1 and said that [illegible]
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indorsement as to the amount [illegible]
escrow agreement.

Charles Jenkins, [illegible]
said he recalls a conversation [illegible]
in which the letter [illegible]
Weaver property, [illegible]
ing up the 1-year price [illegible]
Weaver be refused the offer [illegible]
had been trying for over 1-½ years [illegible]

that our offers had been unsatisfactory. I then told him that Mrs. Weaver would assume the taxes which were his obligation and that he should modify his trust deed to give her six years to pay them. He said he would take that and reduce the payments to $150 a month. He said he would think it over. Monday, September 25, 1940, the appointed day I had not heard from him and I wrote a letter. He called me up later and made some reference to the Weaver matter. I told him that he had our terms. This was in November 1940. After that we again saw Shlensky and paid him $238.50 and got a receipt," which was received in evidence as defendant's exhibit 1.

Although the complaint makes no allegations with respect to the reduction of the monthly payments sought to be made by Mrs. Weaver, the parties evidently had conversations about the liquidation of the taxes, the execution of a junior mortgage and the reduced sum which Mrs. Weaver was to pay on the mortgage indebtedness, but the master found "that no agreement was reached altering the terms and conditions of said escrow agreement: that the defendant Weaver continued to pay the sums required to be paid by her under the terms of the said trust deed; that it became necessary for the defendant Weaver to pay additional sums to procure the release of [the] trust deed ***, which sums should have been paid by the plaintiff," and we are convinced after a careful examination of the record that the master's findings are amply supported by the evidence. It is significant that following all these conversations Mrs. Weaver paid plaintiff $238.50, representing $200 principal and interest, and received a receipt therefor, indicating that nothing had come of the various proposals made to reduce the monthly payments required to be made of her, which were interchangeably tied up with discussions for extending the time for paying up or otherwise removing the lien for delinquent taxes. The master was evidently right in finding that none

that our office [illegible]
Mrs. Jeover would [illegible]
that he should [illegible]
pay them. [illegible]
[illegible] month. [illegible]
25, 1940, the [illegible]
a letter. [illegible]
Weaver [illegible]
November 1940. [illegible]
$250.00 and [illegible]
defendant's exhibit 1.

Although the [illegible] no [illegible]
to the transfer of the [illegible]
Mrs. Weaver, the [illegible]
liquidation of the [illegible]
the returns [illegible]
liabilities, but the [illegible]
during the [illegible]
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paid by her under the [illegible]
same notes [illegible] for the [illegible]
procure the release of [illegible]
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presenting [illegible]
therefore, in [illegible]
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which were [illegible]
the time for [illegible]
quent taxes. [illegible]

of the conversations resulted in any agreement, either with respect to the extension claimed by plaintiff or the reduction in installment payments for which defendant had been negotiating.

It may be conceded of course that the findings of a master, being advisory only, are not conclusive upon appeal, but as stated in Kelly v. Fahrney, 242 Ill. 240, "Without regard to the finding of the master upon any particular question of fact, the ultimate and final question in this court is, Was the decree rendered by the court the proper one under the law and the evidence? If the proper result has been obtained in the court below the decree will not be reversed in this court because of alleged erroneous rulings on exceptions to the master's report." Chechik v. Koletsky, 311 Ill. 433, and cases cited therein are to the same effect. It was of course incumbent upon plaintiff to establish the oral agreement for which it contended by clear and convincing evidence (Selman v. Geary, 334 Ill. 642; Voris v. McIver, 339 Ill. 340). Neither the master nor the chancellor was convinced that the oral agreement contended for had been made, and the circumstances disclosed by the record indicate that although the parties discussed modification of the written escrow agreement, no agreement resulted from their various conferences. The master could not properly have found that the allegations of the complaint were sustained by competent evidence under the degree of proof required in cases where a written agreement is sought to be modified by oral conversations.

It is urged that Mrs. Weaver, "in placing herself in the position of the plaintiff insofar as the tax foreclosure proceedings were concerned, taking advantage of the plaintiff's negotiations and benefit by bidding at the sale in the amount of plaintiff's minimum agreed bid, at a time when the defendant had no obligation so to do, was an act which directly resulted

in the unjust enrichment of the defendant, to the detriment of the plaintiff," and plaintiff argues that the master did not give due consideration to that theory. As a general rule the doctrine of unjust enrichment applies to quasi-contractual relationships from which the court implies a contract, but where there is an express agreement there cannot be an implied contract between the same parties with respect to the same subject matter. Witkowsky v. Affeld, 283 Ill. 557. In the case at bar there was an express agreement by which plaintiff obligated itself to pay the taxes upon the property within 30 days after defendant became entitled to a deed and in the event plaintiff did not perform that undertaking, defendant was authorized to instruct the escrowe to indorse a payment on the $7,300 mortgage note "in an amount equal to all the unpaid general taxes, sales and forfeitures, plus interest, costs, forfeiture fees and any other charges thereon, as of the date of the demand." The situation in which plaintiff finds itself arises from its failure to pay the taxes and release the trust deed as it had agreed to do. There is no evidence that Mrs. Weaver intended to satisfy the unpaid taxes for $1,500 at the time she made the demand upon the escrowee. That demand was made on January 31, 1941 and the sale was not had until February 11 of that year. She was of course aware that the taxes had not been paid by plaintiff and that it had failed to release the trust deed as agreed, and therefore she was justified in believing that the taxes would not be paid. She had bargained for a clear title to the property and fully and faithfully complied with her part of the undertaking. Whatever financial gain plaintiff might have had if it had performed its part of the contract as originally made, was lost by its own dilatory tactics, and for this defendant should not be penalized. Plaintiff had an opportunity to bid the property in at the tax foreclosure sale; in fact, its representative Shlensky appeared at the sale, made a bid, but failed to deposit any money in pursuance thereof. Consequently

[illegible]

his bid was not accepted. Defendant, on the other hand, deposited the amount which she had bid. The sale was regular in every respect and defendant received no more than she was entitled to under the escrow agreement.

Accordingly we are of opinion that the decree dismissing the complaint for want of equity was proper, and it is therefore affirmed.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

42790

321 I.A. 301

ELIZABETH TAYLOR,
Appellee,

v.

BOSTON STORE, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

232 9-42

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Elizabeth Taylor brought suit against the Boston Store, a corporation, to recover damages for injuries resulting from a fall sustained while walking through an aisle in defendant's grocery and meat department. Defendant's motions for a directed verdict, both at the close of plaintiff's case and again at the close of all the evidence, were taken under advisement. The jury returned a verdict for plaintiff in the sum of $600. Thereafter defendant's further motions for judgment notwithstanding the verdict, for a new trial and in arrest of judgment were overruled and judgment was entered on the verdict for $600, from which defendant has taken an appeal.

The accident occurred shortly after 11:00 o'clock in the forenoon on May 4, 1942. Defendant maintains a meat and grocery department in the basement of its store at State and Madison streets, Chicago. The meat counter is constructed of porcelain and is glass enclosed. All meats were kept inside the refrigerated counter and none was displayed outside the showcase, except on an adjoining counter where packaged bacon and dried meats were kept. The floor in the immediate vicinity of the counter was marble or composition. From the undisputed evidence it appears that a crew of women cleaned the building during the night, and during the day a number of porters were distributed over the entire store, one being assigned to the grocery and meat department where he devoted his full time

circulating through the aisles every ten or fifteen minutes, sweeping and cleaning up any particles which might appear on the floor. On the day in question plaintiff, after purchasing meat, placed it in a pushcart or buggy-like contrivance furnished to customers by defendant. While wheeling the buggy down the aisle, she fell and after being helped to her feet, refused medical attention and continued with her purchasesat the vegetable counter and then left the store. The accident occurred at a time when there were few customers in the department. There was no defect or obstruction of any kind on the floor and the lighting was good. Plaintiff's claim of negligence is predicated upon the allegation that defendant carelessly and negligently failed in its duty to maintain the store in a safe manner and that it carelessly and negligently permitted its floor in the basement "to become slippery, slimy, defective, in a manner so as to allow and permit the body of plaintiff to become endangered while in the course of purchasing its said goods, wares and merchandise." The only evidence adduced in support of these allegations was the testimony of Pauline Jones that it seemed there "was a greasy spot or something" on the floor. Louis Kopan, assistant buyer in the grocery department, examined the floor carefully after the accident and testified that he found nothing there. John Whalen, assistant superintendent of maintenance, stated that defendant employs porters who circulate through the various departments, including the meat department, under orders to keep the floors clean, and that he also inspected the premises two or three times a day; that he was in the meat department around 10:00 o'clock that morning and found no unusual or untoward condition on the floor. Various other witnesses called by defendant corroborated these statements.

Among other points raised, it is urged by defendant that the court erred in permitting the case to go to the jury

[illegible] sweeping and [illegible] the floor. On the [illegible] mark, please ill in [illegible] mistake be [illegible] down the table, she [illegible] natural medical [illegible] the vegetable [illegible] observed at a time when [illegible] ment. There was no [illegible] floor and the lighting [illegible] dence is practically [illegible] and negligently [illegible] sale manner and that it [illegible] the floor in the [illegible] in a manner [illegible] become misleading [illegible] good, moral and [illegible] support of these [illegible] that it seemed there [illegible] floor. Lewis Cohen, [illegible] examined the floor [illegible] that he found nothing [illegible] tenant of a [illegible] who [illegible] meal department, [illegible] that he also [illegible] that he was [illegible] morning and [illegible] floor. [illegible] these statements.

[illegible] that the [illegible]

because of plaintiff's failure to prove any actionable negligence on the part of defendant and also that the verdict is against the manifest weight of the evidence. The law is well settled in this state that where the undisputed evidence shows that a foreign substance on the floor was the cause of the accident, the burden is upon the plaintiff to show either that the defendant had actual knowledge of the circumstance or that it had remained upon the floor a sufficient length of time to give constructive notice. Mader v. Mandel Brothers Department Store, 314 Ill. App. 263. In the Mader case plaintiff fell because of a foreign substance on the escalator. The court allowed defendant's motion for judgment notwithstanding the verdict, which ruling was affirmed on appeal. The court said: "There is no showing that the popcorn was on the steps or that the defendant knew or should have known of its presence." In Coyne v. Mutual Grocery Co., Inc., 116 N. J. Law 36, plaintiff charged that she fell in defendant's premises as the result of a foreign substance on the floor. The evidence disclosed that she slipped in the center of the store near a fruit stand and claimed that the floor was slippery as the result of particles of vegetables that fell to the floor from a near-by counter. In discussing defendant's liability the court said: "Generally, the condition which results in injury must either (a) have been, in fact, brought to the previous notice of the store operator, or, failing proof of actual notice, (b) have existed for so long a time as to be, in the exercise of reasonable care, discoverable and remediable before the occurrence of the injury. In the absence of such proof, the legal presumption of due care obtains." Both of the foregoing cases are stronger on the facts than the proceeding at bar, because in both instances there was definite evidence of a foreign substance on the floor which caused the accident. There was no evidence in this proceeding to indicate that defendant knew of the grease spot to which only

[illegible]

one of plaintiff's witnesses testified, or that it had been there for a sufficient period of time to be discovered and remedied by defendant's porter. In view of the facts adduced upon the hearing, we should be obliged to hold that the verdict and judgment are contrary to the manifest weight of the evidence, if that question were essential to the determination of this appeal.

However, plaintiff cannot maintain her action in any event. Several months before the trial defendant had leave, without objection, to file an additional answer which averred, without denial by way of replication or otherwise, that both plaintiff and defendant were subject to the provisions of the Workmen's Compensation Act (Ill. Rev. Stat. 1943, ch. 48, par. 138 et seq.) It appears that plaintiff had for some five years been employed by the Morrison Hotel Bridge Club which leased premises from the Morrison Hotel, where some 50 or 60 people gathered daily to play bridge. The club maintained a kitchen equipped with electric appliances such as a broiler and an oven, as well as sharp knives and other accessories necessary for cooking meals, which were served to its patrons throughout the day and evening. Two persons were employed in the kitchen and some four or five others in the five-room club premises. Plaintiff's counsel himself told the jury in his opening statement that he expected to prove, and the undisputed evidence discloses, that Mrs. Taylor worked for the Morrison Hotel Bridge Club; that it was her duty every day to make all necessary purchases of food and supplies at the Boston Store; that she was instructed what to purchase; that she presented her bills daily to M. S. Reilly, the owner of the club, who reimbursed her for the money expended; that she cooked for the patrons and also waited on table. Under section 3 of the Workmen's Compensation Act both the Morrison Hotel Bridge Club and the Boston Store were automatically bound by the provisions

one of [illegible] [illegible] [illegible] been there for a [illegible] and rendered by defendants [illegible] upon the morning [illegible] and judgment are contrary to the [illegible] evidence, if that question were [illegible] of this appeal.

However, plaintiff's [illegible] in any event. Several months before [illegible] I [illegible] without objection, to file an additional answer which [illegible] without denial by way of [illegible] or otherwise, that both plaintiff and defendant were subject to the provisions of the Workmen's Compensation Act (Gen. Stat. Ch. 97, Art. 1, Sec. 1 et seq.). It appears that plaintiff had for more than five years been employed by the Horstman Hotel Company in which leased premises from the Horstman Hotel, [illegible] or to people attending daily to play bridge. [illegible] kitchen equipped with electric [illegible] and an oven, as well as [illegible] and other [illegible] necessary for [illegible] throughout the day [illegible]. The [illegible] employed in the kitchen are some four or five others in the [illegible] premises. Plaintiff's counsel [illegible] opening at trial that he expected to show [illegible] evidence disclosed, that for [illegible] Hotel Bridge Club, that it [illegible] necessary furnishers of food [illegible] that she was instructed what to [illegible] her bills daily to [illegible]. Daily, the [illegible] reimbursed her for the [illegible] patrons and also worked on table. [illegible] Workmen's Compensation Act both the [illegible] and the Boston Store were automatically bound by [illegible] provisions

of the act. Under the settled rule in this state, where both the employer of an injured person and the third party against whom an action at law is sought to be prosecuted, are subject to the provisions of the act, the injured person is automatically deprived of an action at common law. The recent case of Thornton v. Herman, 380 Ill. 341, is controlling on that question.

Section 29 (paragraph 166) of the Workmen's Compensation Act makes the following provision: "Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee."

In the Thornton case the court called attention to the fact that many cases where section 29 had been construed, were analyzed in O'Brien v. Chicago City Railway Co., 305 Ill. 244, and that a summary of the holdings of the various cases is stated in the following language: "'From these cases it appears that we have held (1) that the common law right of action of an employee against his employer for negligently injuring him in the course of his employment is abolished; (2) that the common law right of action of an employee against any other person than his employer for negligently injuring him in the course of his employment where such other person is bound by the provisions of the Workmen's Compensation act is abolished; ***.'"

It was clearly established by competent evidence in the case that both the Boston Store and plaintiff's employer were subject to and bound by the provisions of the act, and under the decisions quoted and discussed in the Thornton case, plaintiff's cause of action at common law is barred because plaintiff was injured while performing duties incidental to her employment at the time of the accident. The evidence establishing that fact was adduced by plaintiff herself and her employer. Because of these circumstances the court should have either directed a verdict or entered judgment notwithstanding the verdict.

The judgment is therefore reversed and the cause remanded with directions that judgment be entered for defendant notwithstanding the verdict.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

It was clearly proved by competent evidence in the case that both the [illegible] and [illegible] employer were subject to the [illegible] of the plaintiff, and under the decisions quoted [illegible] in Thompson v. [illegible], plaintiff's cause of action [illegible] because plaintiff was injured [illegible] not [illegible] to her employment at the time of [illegible]. The evidence actually showed that [illegible] and her employer. Because of these circumstances [illegible] should have stated [illegible] a verdict or entered judgment notwithstanding the verdict.

The judgment is therefore reversed and the cause remanded with directions that judgment be entered for defendants notwithstanding the verdict.

[illegible]

[illegible] and [illegible], [illegible], concur.

42169

LESSIE COOK, Administratrix of the Estate of Cleveland Stokes, Deceased, and ANNA STOV-STOKES, (Plaintiffs)
Appellants,

v.

THE PULLMAN COMPANY, a corporation; PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, and ONZELLE HARRIS,
Defendants.

ONZELLE HARRIS, (Defendant)
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal, by Lessie Cook, Administratrix of the Estate of Cleveland Stokes, Deceased, and Anna Stov-Stokes, seeks to reverse a decree ordering the payment to Onzelle Harris, otherwise known as Onzelle Stokes, of $1,617.45, the proceeds of a life insurance policy. The decree overrules the exceptions filed by appellants to the report of a master in chancery and approves and confirms the report.

We quote from the report of the master:

"* * *

"II

"THE PLEADINGS.

"(3) On April 17, 1941, these proceedings were commenced by the filing of a complaint in chancery by Lessie Cook, Administratrix, and by Anna Stokes. The complaint alleged that Cleveland Stokes died intestate on March 16, 1941, and that the plaintiff, Lessie Cook, was duly appointed Administratrix of his estate by the Probate Court of Cook County. During his lifetime, Cleveland Stokes had procured a certain policy of insurance from the defendant, Prudential Insurance Company of America, which was a group policy taken

BESSIE COOK, Administratrix of the
Estate of Cleveland Torres, de-
ceased, and ANNA STOV-BICK'S,
(Plaintiffs)

[illegible]

v.

THE PRUDENTIAL COMPANY, a corporation
PRUDENTIAL [illegible]
MEXICO, a corporation, and
ONNELL HARRIS,
Defendants.

ONNELL HARRIS,
(Defendant)

[illegible]

MR. JUSTICE SCHENCK DELIVERED THE OPINION OF THE COURT.

This appeal, by Bessie Cook, [illegible] of the Estate of Cleveland Torres, deceased, [illegible] tan-Torres, seeks to reverse a decree overruling the demurrer to Onnellie Harris, otherwise known as [illegible] Torres, of July 1941, the proceeds of a life insurance policy. The decree overrules the exceptions filed by [illegible] the report of master in chancery and [illegible] the decree.

[illegible] quote from the report of the master:

"[illegible]

II

"The [illegible]

"(3) On April 17, 1941, [illegible] suits were commenced by the filing of a complaint in chancery by Bessie Cook, Administratrix, and by Anna [illegible]. The complaint alleged that Cleveland Torres [illegible] on [illegible], 1941, and that the plaintiff, Bessie [illegible], [illegible] Administratrix of his estate by the [illegible] of [illegible] County. During his lifetime, Cleveland [illegible] a certain policy of insurance from the [illegible] Mutual Insurance Company of Mexico, which was a group policy taken

out by him by virtue of his employment during his lifetime with The Pullman Company. Anna Stokes, plaintiff, wife of the assured, was designated beneficiary of the policy. Thereafter, divers changes of beneficiary were made, so that at the time of the death of the assured, the beneficiary was Onzelle Harris, otherwise known as Onzelle Stokes. Plaintiffs prayed that the proceeds of the policy of insurance might be paid by the defendants to either or both of plaintiffs. The complaint also prayed for certain injunctional relief against the defendants.

(4) * * *

(5) By stipulation of the parties, an order was entered * * * dismissing The Pullman Company, a corporation, as a party defendant herein.

(6) * * * Prudential Insurance Company of America filed its answer and counterclaim in the nature of a bill of interpleader. Said defendant stated that it was holding the sum of $1800, being the proceeds of the policy in question, and that the various claimants to said fund should be required to settle their disputes without liability to the said Prudential Insurance Company of America. Said Company set out that it was ready to pay the sum in question as directed by the Court, and that it would pay the funds to the Clerk of the Court, to remain subject to the order of this Court.

"(7) * * * the defendant, Onzelle Harris, also known as Onzelle Stokes, filed her answer to the complaint. She alleged that the changes in the beneficiary of the policy were made by Cleveland Stokes, deceased, of his own free will, and that she, as the lawfully designated beneficiary at the time of his death, was entitled to the proceeds of the policy. Said defendant also alleged that she was known as Onzelle Stokes, that she raised a child of the said Cleve-

out by him by virtue of [illegible] with the William Dooley, [illegible] the deceased, [illegible] after, given change of [illegible] time of the death of the deceased, [illegible] Harris, otherwise known as [illegible] that the proceeds of the policy [illegible] the defendants to either or [illegible] also prayed for certain [illegible] the defendants.

(4)

(5) By stipulation of [illegible] entered * * [illegible] as a party defendant herein.

(6) * * * [illegible] filed its answer and court [illegible] of interpleader. [illegible] sum of $1800, being [illegible] and that the various claimants [illegible] to settle their [illegible] Prudential Insurance Company of [illegible] out that it was [illegible] by the court, and [illegible] of the court, to [illegible]

"(7) * * * the defendant, [illegible] as Omaha Stokes, [illegible] alleged that the changes in the beneficiary [illegible] were made by Haversham Stokes, [illegible] will, and that he, as the [illegible] at the time [illegible] was [illegible] of the policy. Said defendant also alleged that [illegible] known as Omaha Stokes, but who [illegible] of the said Clove-

land Stokes, that she was made beneficiary of the policy in question by the deceased without her knowledge, and was unaware that she had been made beneficiary until the policy was delivered to her.

"(8) * * * the defendant, Onzelle Harris, also known as Onzelle Stokes, filed her answer to the counterclaim * * * in which she consented that said company deposit the proceeds of the policy, less costs, with the Clerk of this Court. * * * an order was entered herein that the complaint of plaintiffs stand as their answer to the counterclaim * * *.

"(9) * * * this matter was referred to the Master with directions that he take evidence and report findings of fact and conclusions of law.

"(10) * * * Prudential Insurance Company of America, a corporation, filed its amended counterclaim. The order provided that the answers of Onzelle Harris, now known as Onzelle Stokes, and of plaintiffs to the original counterclaim stand as their respective answers to the amended counterclaim. This was done without prejudice to the order of reference to the Master. The amended counterclaim made Richard Stokes, minor son of Cleveland Stokes, deceased, a counter-defendant.

"(11) * * * on motion of Prudential Insurance Company of America, the court appointed Patrick B. Prescott, Jr., Guardian ad Litem, for Richard Stokes, a minor. * * * said minor, by his guardian ad litem, filed his answer herein in which he set out that he was eleven years of age, and that he submitted his rights to the protection of the court. The minor also filed * * * his certain counterclaim in which he set out that he was the son of the deceased Cleveland Stokes and one, Bernice Gadberry. These persons lived together as husband and wife from 1929 until Bernice Gadberry died in 1934. It was also alleged that the minor had been designated beneficiary on said policy of insurance after the death of said Bernice

land stokes, [illegible]
question by the [illegible]
that she had [illegible]
to her.

"(3) [illegible]
as Omaelle stokes, [illegible]
in which she [illegible]
of the police, [illegible]
an order was [illegible]
stand as their [illegible]

"(4) [illegible]
with [illegible]
fact and conclusions of law.

"(I) [illegible]
a corporation, filed [illegible]
provided that [illegible]
Omaelle stokes, and of [illegible]
stand as their [illegible]
this was done [illegible]
the master. [illegible]
minor son of [illegible]

"(II) [illegible]
of marriage, the court [illegible]
custodian so [illegible]
minor, by [illegible]
which he set out [illegible]
submitted [illegible]
also filed [illegible]
that he was the son of [illegible]
Bernice Gaskery. [illegible]
and wife from [illegible]
was also alleged that [illegible]
on said policy of [illegible]

Gadberry, who had preceded him as beneficiary. It was also alleged that the defendant, Onzelle Harris, otherwise known as Onzelle Stokes, induced Cleveland Stokes to make her beneficiary of the policy by false representations. The counterclaim of the minor therefore prayed that he might be adjudged to be beneficiary of the said policy of insurance.

"(12) * * * plaintiffs filed their answer to the counterclaim of the minor. They denied most of the allegations therein contained and alleged affirmatively that the defendant, Onzelle Harris, otherwise known as Onzelle Stokes, was never at any time the legal wife of Cleveland Stokes, deceased, or legal beneficiary of the policy of insurance in question.

"(13) * * * plaintiffs filed their reply to the answer of the defendant, Onzelle Harris, otherwise known as Onzelle Stokes. They stated that she was not entitled to the proceeds of the policy of insurance because it affirmatively appeared from her answer that she was never legally married to Cleveland Stokes, hence that she was not his surviving widow.

"(14) On July 31, 1941, an interlocutory decree was entered herein which made certain findings with reference to the policy of insurance and the changes made in the beneficiary thereof. The Court found that the Prudential Insurance Company of America had incurred court costs in the sum of $7.80. It was therefore ordered that the said insurance company should pay to the Clerk of this Court the net sum of $1,792.20, to abide the further order of this Court, and thereupon in said decree the said insurance company, Prudential Insurance Company of America, a corporation, was dismissed out of this cause.

"(15) * * * the defendant, Onzelle Harris, otherwise known as Onzelle Stokes, filed her answer to the counterclaim of Richard Stokes, minor. She admitted that Cleveland Stokes moved to her home during the year 1938 and denied all remaining

Gregory, who has [illegible] also alleged that the defendant, [illegible] as [illegible] to be, [illegible] fidelity of the policy by [illegible] claim of the plaintiff [illegible] to be beneficiary of the said policy [illegible].

"(3) [illegible] counterclaim of the [illegible] foreign or [illegible] domestic [illegible] at any time the [illegible] legal beneficiary of the policy [illegible].

"(4) [illegible] to the [illegible] of the defendant, [illegible] stolen. They [illegible] of the policy of insurance [illegible] from her [illegible] stolen, hence [illegible].

"(4) [illegible] entered herein [illegible] the policy of [illegible] thereof. The court [illegible] of [illegible] was therefore [illegible] pay to the [illegible] strike the [illegible] decree the said [illegible] Company of [illegible] this date.

"(5) [illegible] known as [illegible] of [illegible] stolen. [illegible] moved to her home during the [illegible] [illegible] [illegible]

allegations contained in said counterclaim. She further denied that the minor was entitled to any of the proceeds of the policy, but stated that she was entitled to the entire fund then on deposit with the Clerk of this Court.

"III * * *

"IV.

"FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

"(17) On June 1, 1933, a group policy, No. G4149, was duly issued by the Prudential Insurance Company of America for the benefit of Pullman, Incorporated, and its subsidiaries. The policy provided for placing of insurance upon the lives of employes of the insured, with premiums to be paid every month by the employer. The policy stated that it was understood that the employer and employes should contribute jointly toward the payment of the premiums, and that the contribution of the individual employee should not be more than 60¢ per month for each $1,000 of insurance. It was also stated in said policy that any person insured thereunder might at any time change their beneficiary by written notice through the employer to the insurance company at its home office on a form furnished by it, and that said change should take effect when due acknowledgment thereof should be furnished by the company to such person insured, and all rights of the former beneficiary should thereupon cease. Photostatic copy of said policy was received in evidence as Exhibit 1 of August 26, 1941.

"(18) On * * * September 1, 1929, a certain certificate of insurance in the sum of $1500.00 was issued by the Prudential Insurance Company of America on the life of Cleveland Stokes, who was then in the employ of The Pullman Company. Said policy named as beneficiary Anna Stokes, who is one of the plaintiffs herein, as wife of the insured. Said policy was received in evidence as Plaintiffs' Exhibit 3 of August 18, 1941. There-

allegations con[illegible]

that the minor was [illegible]

but stated that [illegible]

deposit [illegible]

"(IV) [illegible]

was duly issued by the [illegible]

for the benefit of [illegible]

The policy provided for [illegible]

employes of the insured [illegible]

by the employer. The [illegible]

that the employer and employes [illegible]

toward the payment of the [illegible]

of the individual employes [illegible]

month for each [illegible]

said policy that any [illegible]

this change [illegible]

employer to [illegible]

form for [illegible]

when due to [illegible]

company to [illegible]

beneficiary [illegible]

policy [illegible]

"(1) [illegible]

date of [illegible]

substantial [illegible]

tokes, who was [illegible]

policy made as [illegible]

title [illegible]

in evidence as [illegible]

after, on July 1, 1932, said certificate of insurance was increased to the sum of $1600.00, and on June 1, 1939, the certificate was increased to the sum of $1800.00.

"(19) Cleveland Stokes departed this life intestate on March 16, 1941, at which time said policy of insurance was in full force and effect in the sum of $1800.00. The net amount of said policy, being in the sum of $1,792.20 after deducting costs incurred by the defendant, Prudential Insurance Company of America, has been deposited with the Clerk of this Court, subject to the order of court, as provided in an interlocutory decree entered herein on July 31, 1941.

"(20) The estate of Cleveland Stokes was duly filed for probate in the Probate Court of Cook County, and * * * Letters of Administration were issued to Lessie Cook, as Administratrix. Certified copy of Letters of Administration were received in evidence as Plaintiffs' Exhibit 1 of August 11, 1941. * * * It appears * * * that said Cleveland Stokes left him surviving as his only heirs-at-law and next of kin, plaintiff, Joanna Stokes, otherwise known as Anna Stokes, Ideal Stokes, his daughter, and Frank Stokes, his son.

"(21) It appears from the testimony that Cleveland Stokes was married to Joanna Drane on December 25, 1921, in Sunflower County, Mississippi. Marriage license issued to Cleveland Stove and Joanna Drane on December 24, 1921, was received in evidence as Plaintiffs' Exhibit A of August 11, 1941. It appears that Cleveland Stokes was otherwise known as Cleveland Stove, and Joanna, his wife, was sometimes known as Anna. The Master finds that Cleveland Stokes was married but once during his lifetime, so that at the time of his death, plaintiff, Anna Stokes, was his surviving widow.

"(22) Plaintiff, Anna Stokes, continued to be the beneficiary of said policy until January 23, 1930. On that date, Cleveland Stokes executed a request for a change of

after, on July 1, 1941, [illegible]
ceased by the death of [illegible]
date was increased to [illegible].

"(19) Cleveland [illegible]
on June 10, 1941, [illegible]
in full force and effect [illegible]
of said policy, being in the sum of [illegible]
costs incurred by the defendant, [illegible]
of America, has been deposited with the [illegible]
subject to the order of court, [illegible]
decree entered herein on July 1, 1941.

"(20) The estate of Cleveland [illegible]
for probate in the Probate Court of [illegible]
letters of Administration [illegible]
administratrix. Certified copy of [illegible]
were received in evidence as [illegible]
11, 1941. [illegible]
left him surviving as his only [illegible]
plaintiff, Joanna Stokes, [illegible]
Ideal Stokes, his daughter, [illegible]

"(21) [illegible]
Stokes was married to [illegible]
Sunflower County, Mississippi. [illegible]
Cleveland Stokes and [illegible]
received in evidence as [illegible]
1941. It appears that Cleveland [illegible]
as Cleveland Stokes, and [illegible]
as Anna. The record [illegible]
but once during his [illegible]
plaintiff, Anna Stokes, [illegible]

"(22) Plaintiff, [illegible]
beneficiary of said policy [illegible]
date, Cleveland Stokes executed a [illegible]

beneficiary from Anna Stokes to Bernice Stokes. The request for change of beneficiary was executed on a form provided by Pullman, Incorporated, in accordance with the provisions of the policy hereinabove referred to. Said change of beneficiary was received in evidence by agreement of the parties as Exhibit 3 of August 18, 1941. In this document, plaintiff, Anna Stokes, is referred to as the former wife of the insured, although it does not appear from the record that a decree of divorce was ever entered to dissolve the marriage between Cleveland Stokes and Anna Stokes. Bernice Stokes is referred to in that document as the present wife of the insured, although it does not appear from the evidence that Cleveland Stokes and Bernice Stokes, otherwise known as Bernice Gadberry, were ever legally married.

"(23) Richard Stokes, a minor, who has filed a counterclaim herein, was born on August 7, 1930 to Cleveland Stokes and Bernice Stokes, who was formerly known as Bernice Gadberry. Certified copy of his birth certificate was received in evidence as Exhibit A of March 27, 1941. His birthplace is given as Chicago, Illinois in said birth certificate. It should be noted that Bernice Stokes was designated beneficiary on the said policy of insurance some six months prior to the birth of Richard Stokes.

"(24) On March 8, 1934, said Cleveland Stokes executed a similar document providing for change of beneficiary from Bernice Stokes to Richard Stokes. Said document referred to Bernice Stokes as wife of the insured and to Richard Stokes as his son. Said change of beneficiary document was received in evidence by agreement as Exhibit 5 of August 18, 1941.

"(25) Richard Stokes continued to be beneficiary of said policy until May 10, 1938, some three years prior to the death of Cleveland Stokes. On that date, Cleveland Stokes executed still another change of beneficiary document in which he requested that the beneficiary be changed from his son,

Richard Stokes, to the defendant, Onzelle Stokes. In this document, Onzelle Stokes is referred to as wife of the insured, although it appears from the evidence that she was never legally married to Cleveland Stokes. Said last mentioned change of beneficiary was received in evidence by agreement as Exhibit 7 of August 18, 1941. Said Onzelle Stokes, defendant herein, remained designated as beneficiary of said policy and was such beneficiary at the time of the death of Cleveland Stokes, the insured. At the time of the death of Cleveland Stokes, he was residing with the defendant, Onzelle Harris, otherwise known as Onzelle Stokes, and she delivered over the policy of insurance and the identification cards of the deceased to an investigator for the Pullman Company at his request.

"(26) It further appears from the testimony of witnesses that * * * Onzelle Harris was widely known as Onzelle Stokes and as the wife of Cleveland Stokes. Since February, 1937, she lived under the name of Stokes and lived with Cleveland Stokes as his wife. Upon the death of Cleveland Stokes, she furnished funds for his burial by borrowing from the Metropolitan Burial Association, and she is now in the process of completing payments. Her social security card, * * * issued in the name of Onzelle Stokes, was received in evidence as her Exhibit 1 of August 18, 1941. Commencing in March, 1937, the said Onzelle Harris, otherwise known as Onzelle Stokes, had custody of Richard Stokes * * *.

"(27) No testimony has been introduced which tends to prove that the last mentioned change of beneficiary executed by Cleveland Stokes on May 10, 1938 was signed by him as a result of any misrepresentation by the defendant, Onzelle Harris, otherwise known as Onzelle Stokes. The Master therefore finds that Cleveland Stokes executed the required documents to make said Onzelle Stokes beneficiary of the policy herein involved of his

own free will and without the making of any false statements or misrepresentations by Onzelle Stokes or any other person. The Master therefore finds that at the time of the death of the said Cleveland Stokes, the defendant Onzelle Harris, otherwise known as Onzelle Stokes, was legally designated beneficiary of the policy of insurance herein involved.

"(28) The Master therefore concludes that the equities in this case are with the defendant, Onzelle Harris, otherwise known as Onzelle Stokes, and against the plaintiffs, Lessie Cook, Administratrix of the Estate of Cleveland Stokes, deceased, and Anna Stokes, and also against Richard Stokes, the minor defendant hereto. The Master finds that the allegations of the complaint of plaintifs and the counterclaim of the minor defendant, Richard Stokes, have not been proved by the testimony. It is therefore recommended that a decree be entered herein in the usual form providing for payment of the entire proceeds of the policy of insurance now on deposit with the Clerk of this Court to the defendant, Onzelle Harris, otherwise known as Onzelle Stokes, and that the complaint of plaintiffs and the counterclaim of the minor defendant, Richard Stokes, be dismissed for want of equity."

No cross-appeal has been filed in behalf of Richard Stokes.

Appellant Anna Stokes contends that she was the lawful wife of the decedent at the time that she was named as the beneficiary in the original policy, that she was still his wife at the time of his death, and that therefore she is the rightful and legal beneficiary under the policy "notwithstanding any purported or subsequent change of beneficiary;" that when the policy was originally taken out, appellant Anna Stov-Stokes was made the beneficiary and that "she obtained a vested interest therein;" "that an attempted change of beneficiary in favor of Onzell Harris (occupying the status of his 'mistress'),

own free [illegible]

or [illegible]

the [illegible]

[illegible]

[illegible]

of [illegible]

(b) [illegible]

in this case [illegible]

known as [illegible]

administrator [illegible]

[illegible]

[illegible]

[illegible]

of plaintiffs and the [illegible]

[illegible] have not been [illegible]

recommended that a decree [illegible]

providing for payment of the [illegible]

[illegible]

defendants, [illegible]

and that [illegible]

the minor [illegible]

of [illegible]."

[illegible]

[illegible]

[illegible]

wife of [illegible]

[illegible]

the time of the [illegible]

and legal [illegible]

purported [illegible]

policy was [illegible]

made the beneficiary and that [illegible]

thereby." "Such an [illegible]

of Orrell Morris ([illegible]

she having no insurable interest in his life, such attempted change is not only void but also against public policy under the decisions of our Courts." The policy provides:

"(The Beneficiary may be changed in accordance with the terms of the Policy by said employee at any time while the insurance on his or her life is in force by notifying the Company through the Employer. Such change shall take effect when due acknowledgment thereof is furnished by the Company to such person insured and all rights of his or her former Beneficiary or Beneficiaries shall thereupon cease.)"

Appellee, Onzelle Harris, contends that "the certificate of insurance issued to Cleveland Stokes reserved the right of the insured to change the beneficiary. Therefore, the original beneficiary had a mere expectancy subject to be revoked by the insured at will. The insured properly changed the beneficiary to said policy so that at his death the defendant, Onzelle Harris, also known as Onzelle Stokes, being the last beneficiary designated in the policy, was entitled to its proceeds." From the report of the master, which is fully sustained by the proof, it clearly appears that at the time of the death of Cleveland Stokes Onzelle Stokes was the designated beneficiary under the policy. Under the provision to which we have just referred, appellant Anna Stov-Stokes did not have a vested interest in the policy but a mere expectancy which was subject to be revoked by the insured at will. (See Davis v. Metropolitan Life Ins. Co., 285 Ill. App. 398, 400; Martin v. Stubbings, 126 Ill. 387; Equitable Life Ins. Co. v. Mitchell, 248 Ill. App. 401; Mayer v. Illinois Life Ins. Co., 211 Ill. App. 285; Gallegos v. Aetna Life Ins. Co., 292 Ill. App. 123, 134.) We cannot agree with the contention of appellants that our opinion in Aetna Life Ins. Co. v. Mattie Marsh, 274 Ill. App. 668, sustains their position. There we held that there were two separate and distinct contracts of insurance; that in the first contract the

she having no insurable interest [illegible] change is not only void but also [illegible] under the decisions of our courts. The policy [illegible]:

"(The Beneficiary may be changed in accordance with the terms of the policy by [illegible] the insurance on his or her life [illegible] through the Employer. [illegible] acknowledgment thereof is [illegible] the company to such person insured and all rights [illegible] or Beneficiaries shall thereupon cease.)"

Applies, unless [illegible] of insurance issued to Cleveland [illegible] the insured to change the beneficiary. Moreover, the original beneficiary had a very expectancy [illegible] by the insured at will. The insured [illegible] to said policy so that at his death [illegible] Varria, also known as Cresilie [illegible] designated in the policy, [illegible] the report of the master, [illegible] it clearly appears that at the time of [illegible] Cornelie [illegible] policy. Under the resolution [illegible] appellant [illegible] the policy but a mere expectancy [illegible] revoked by the insured at will. ([illegible] Life Ins. Co., [illegible] 120 Ill. 327; [illegible] App. 401; Layer v. [illegible] Gallegos v. [illegible] cannot agree with the [illegible] in Aetna Life Ins. Co. v. [illegible] their position. There we held that there [illegible] distinct contracts of insurance; but in the [illegible]

insured designated Lucy Smith, known as Lucy Marsh, as the beneficiary, and in the second contract he designated Mattie Marsh as the beneficiary. It appeared that at the time Mattie Marsh was designated as the beneficiary in the second contract she was not the wife of the insured but that she afterwards became his wife. She contended that the insured, by making her the beneficiary in the "additional insurance," disclosed an intention to make her the beneficiary in the first contract of insurance. We held against this contention and decided that Lucy Marsh was entitled to the proceeds of the first contract of insurance.

Appellants contend that when Cleveland Stokes executed a request for change of beneficiary from Anna Stokes to Bernice Stokes on January 23, 1930, he referred to appellant Anna Stokes as his former wife and Bernice Stokes as his present wife; that such conduct on the part of the insured amounted to a fraud upon appellant, his legal wife, and that equity and public policy will not permit the assured to practice such a fraud. The answer of the insurance company admits that Onzelle Stokes was designated as the beneficiary under changes of beneficiary form dated May 11, 1938, and the complaint filed by appellants contains a photostatic copy of the insurance contract, attached to which is a certificate issued by the insurance company which certifies that "The Beneficiary has been changed to Onzell Stokes, wife of the Insured."

As we understand appellants' position, they further contend that "the attempted change of beneficiary by deceased by representing the new beneficiary [Onzelle Stokes] as his 'wife', whereas she was not his lawful wife, was and is a fraud upon the vested rights of the widow and the public policy of this State." As we have already stated, appellant Anna Stokes had no vested right in the insurance contract. It has frequently been held that when the beneficiary names a particular individual as "wife" that word is to be taken as a mere descriptio personae and that the name and not the description controls. (See Doney v.

insured deceased [illegible]
ficiary, and in the [illegible]
as the beneficiary. [illegible]
was designated as the [illegible]
not the wife of the [illegible]
She contended that [illegible]
the "additional insurance" [illegible]
the beneficiary in the [illegible]
against this construction [illegible]
to the proceeds of the first [illegible]

Appellants contend [illegible]
a request for change of [illegible]
stokes on January 23, 1939, [illegible]
as his former wife and [illegible]
such conduct on the part of [illegible]
appellant, his [illegible]
not permit the assured [illegible]
the insurance company [illegible]
as the beneficiary [illegible]
1938, and the court [illegible]
copy of the insurance [illegible]
issued by the insurance company [illegible]
ciary has been changed to Orrell [illegible]

As we understand [illegible]
contend that "the [illegible]
by reasonably [illegible]
wife", where a [illegible]
upon the written [illegible]
this [illegible]
had no vested right [illegible]
been held that [illegible]
as "wife" that word is to be [illegible]
and that the name has not the conventional [illegible]

Equitable Life Assurance Society, 97 N. J. L. 393, and cases cited therein. See, also, Clements v. Terrell, 145 S. E. (Ga.) 78; Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, 52 P. 1040; Slaughter v. Slaughter, 186 Ala. 302.) In Vivar v. Knights of Pythias, 52 N. J. L. 455, an applicant for insurance in the Endowment Rank of the Order of Knights of Pythias was required to state, in his application, to whom he desired the sum insured to be paid and the relationship of the payee to himself; he responded, "To my wife, Emily Louisa Vivar." The contract bound the insurer to pay the sum insured "to Emily Louisa Vivar, his wife, as directed by said Brother in his application, or to such other person or persons as he may subsequently direct, by will or otherwise." The court held that the relationship of the payee was not material, and was not deemed material by the insurer, and that Emily Louisa Vivar could recover the sum insured, even though the applicant knew that she was not his lawful wife. In Prudential Ins. Co. of Am. v. Morris, 70 Atl. (N.J.) 924, the opinion states:

"At the time the application was made for the policy, and at the time the policy was issued, Morris was living with Carrie V. Morris at Netcong, in this state. They were known to the people with whom they boarded and to the people with whom they were acquainted as husband and wife. She is described in the application, a copy of which is indorsed on the policy, as his wife, and after the policy was issued it was delivered to Carrie V. Morris by him. She held it until his death, and then submitted proofs of death to the company, which issued the policy. I am of opinion that the woman with whom the insured was living at the time the policy was taken out, and who was then known as Carrie V. Morris, is entitled to the money. She was named specifically as the beneficiary. She was living with him as his wife, and was known among the people with whom they lived as such. The case is a parallel to the case of Overbeck

v. Overbeck, 155 Pa. 5, 25 Atl. 646. In this case, as in that, it is certain that the insured did not intend that the proceeds of the policy should go to his lawful wife. On the contrary, he designated the woman with whom he was living as the beneficiary, and the money must be awarded to her."

As to the case of Carter v. Employees' Ben. Ass'n of Am. Steel Foundries, 212 Ill. App. 213, cited by appellants, it is sufficient to state that there the insured designated as his beneficiary one Ada Taylor, whom he held out as his wife but to whom he was never married, and the rules and regulations of the association restricted the payment of the insurance benefits to a member of the family of the insured. Moreover, the rules and regulations of the association provided that the membership of any member guilty of disreputable or unlawful conduct would be automatically canceled and rendered of no force and effect, and it was held that the insured was guilty of disreputable and unlawful conduct by holding out and living with Ada Taylor as his wife when she was not his wife.

Appellants contend that the procedure governing the changing of beneficiaries under the group policies was not complied with in this case, as there is no evidence to show that any change of the original beneficiary was ever accepted and approved by the Prudential Company, as its rules provide, and, therefore, Anna Stokes is the sole and legal beneficiary of her husband's policy of insurance. There is no merit in this contention. Indeed, it seems to be an afterthought. The complairt of appellants was based upon the theory that the insured made the change of beneficiary to Onzelle Stokes but that the change was an unlawful one. Attached to the complaint as an exhibit and made a part of the complaint, is a photostatic copy of the insurance contract, to which is attached a certificate of the insurance company that contains, inter alia, the following:

"This is to Certify that the following change has been

recorded in connection with the insurance evidenced by Certificate No. A 23880 under Group Policy No. C-4149

"* * *

"The Beneficiary has been changed to - ONZELL STOKES, wife of the Insured.

"* * *

"This certificate supersedes all certificates heretofore issued to the employe named herein under Group Life Policy No. G-2525, which is no longer in force."

In the margin of the certificate appears the following: "This Form should be securely attached to the Group Insurance Certificate referred to hereon."

The answer of the insurance company "admits that Onzelle Stokes was designated as beneficiary under changes of beneficiary form dated May 11, 1938." In the counter-complaint in the nature of an interpleader of the insurance company it states "that thereafter on May 11, 1938, insured executed further change of beneficiary in which Onzell Stokes was designated as beneficiary under said certificate of insurance." An investigator for the Pullman Company testified that after the death of Stokes Onzelle Harris, also known as Onzelle Stokes, gave him the policy in question, which he turned over to the Pullman Company. Onzelle Harris testified that Cleveland Stokes gave her the policy during her lifetime. The Prudential Insurance Company produced upon the hearing photostatic copies of the forms signed by Cleveland Stokes and requesting the several changes of beneficiary.

The decedent had the right to change the beneficiary in his policy of insurance and at his death defendant Onzelle Harris, also known as Onzelle Stokes, was the beneficiary designated in the policy, and she is entitled to the proceeds of the same.

The decretal judgment of the Superior court of Cr county is affirmed.

DECRETAL JUDGMENT

Friend, P.J., and Sullivan, J., concur.

[illegible]

No. A 2[illegible] [illegible]

" " "

"The Powers [illegible]

life of the insured.

" " "

"This certificate [illegible]

issues to the employ[illegible]

G-2[illegible], which is no longer [illegible]

In the margin of the [illegible]

"This form should be accompanied [illegible]

certificate returned to [illegible].

The answer of the [illegible] stones are analyzed as [illegible]

form dated May 14, 1[illegible] [illegible]

of an interpleader of [illegible]

hereafter on May 14, [illegible]

beneficiary in which [illegible]

under said certificate [illegible]

Railroad Company [illegible]

Harris, also known [illegible]

question, [illegible]

Harris [illegible]

during her lifetime, [illegible]

upon the [illegible]

Cleveland [illegible]

ficiary.

The [illegible]

in his policy of [illegible]

Harris, also known [illegible]

designated in the p[illegible]

of the same.

The [illegible]

country is affirm[illegible]

42176

321 I.A. 302

ELMER KREGER,
Appellee,

vs.

GEORGE W. DIENER MANUFACTURING COMPANY, a corporation of Illinois,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

994
234

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

George W. Diener Manufacturing Company, defendant, appeals from a judgment for $8,000 entered against it in an action brought by Elmer Kreger, plaintiff, to recover damages for bodily injuries sustained by him as the result of the explosion of a fire extinguisher manufactured and sold by defendant. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at $12,500. The trial court required plaintiff to remit $4,500.

No point is raised on the pleadings.

Plaintiff's theory of the case is that defendant "manufactured, sold and warranted a fire extinguisher which was intended to be and was used in fighting fires. The fire extinguisher had a valve at the end of the hose which could be closed, and was intended to be closed to retain chemicals within the fire extinguisher after the chemical reaction caused by the sulphuric acid and the soda water had commenced but before the chemicals were fully discharged. The fire extinguisher was of insufficient tensile strength through defective design (shut-off nozzle) or defective workmanship (poorly soldered and riveted seam) to resist the pressure caused when the nozzle was closed. The inherent structural weakness or the mechanical defect was the proximate cause of the injuries to the plaintiff, Elmer Kreger. The case was tried as a negligence case and as an action for breach of warranty. Both issues were submitted to the jury and a general verdict brought in in

RIMER KREGER,
Appellee,

v.

GEORGE W. DIEMER MANUFACTURING
COMPANY, a corporation of
Illinois,
Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT:

George W. Diemer Manufacturing Company, defendant, appeals from a judgment for $8,000 entered against it in an action brought by Rimer Kreger, plaintiff, to recover damages for bodily injuries sustained by him as the result of the explosion of a fire extinguisher manufactured and sold by defendant. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at $8,000. The trial court required plaintiff to remit $1,000.

No point is raised on the pleadings.

Plaintiff's theory of the case is that defendant "manufactured, sold and warranted a fire extinguisher which was intended to be and was used in extinguishing fires. The fire extinguisher had a valve at the end of the hose which could be closed, and was intended to be closed to retain chemicals within the fire extinguisher after the chemical reaction caused by the sulphuric acid and the soda water had commenced but before the chemicals were fully discharged. The fire extinguisher was of insufficient tensile strength through defective design (shut-off nozzle) or defective workmanship (poorly soldered and riveted seam) to resist the pressure caused when the nozzle was closed. The inherent structural weakness or the mechanical defect was the proximate cause of the injuries to the plaintiff, Rimer Kreger." The case was tried as a negligence case and as an action for breach of warranty. Both issues were submitted to the jury and a general verdict brought in in

favor of the plaintiff." Defendant states its theory as follows: "That it was not guilty of any negligence in the assembly or construction of the said fire extinguisher; that it made proper and sufficient inspection of said fire extinguisher and the parts thereof; that it made proper and sufficient tests of the internal pressure resistance of said fire extinguisher; that it placed and attached on the outside of said fire extinguisher adequate, safe and sufficient and proper instructions showing the correct ingredients and the respective amounts thereof to be used in charging said fire extinguisher, and also showing the proper method of operating, using and handling the same; that there was no defect or insufficiency in any of the metal or materials used in the construction of said fire extinguisher; that there was no defect or insufficiency in the workmanship by which said fire extinguisher was constructed; that there was no defect or insufficiency in any of the rivets or other materials used in the construction of the seam of said fire extinguisher; that there was no defect or insufficiency in the workmanship by which said seam was constructed; that the hose having on one end thereof a nozzle with a shut-off valve therein was a proper and safe appliance to be attached to said extinguisher; that the tests made by the defendant on said fire extinguisher showed that said extinguisher was capable of withstanding internal pressure much greater than any such pressure that could be generated or produced within said extinguisher when the same was charged, used, operated and handled in accordance with the said instructions; that said fire extinguisher was not a dangerous but a safe instrumentality when charged, used, operated and handled in accordance with said instructions; that defendant did not commit any breach of any warranty; and that the alleged explosion of said fire extinguisher and the alleged injuries claimed by the plaintiff to have been sustained thereby, were not caused by any negligence of the defendant."

favor of the plaintiff." Defendant states its theory as follows:

"That it was not guilty of any negligence in the assembly or construction of the said fire extinguisher; that it made proper and sufficient inspection of said fire extinguisher and the parts thereof; that it made proper and sufficient tests of the internal pressure resistance of said fire extinguisher; that it placed and attached on the outside of said fire extinguisher adequate, safe and sufficient and proper instructions showing the correct ingredients and the respective amounts thereof to be used in charging said fire extinguisher, and also showing the proper method of operating, using and handling the same; that there was no defect or insufficiency in any of the metal or materials used in the construction of said fire extinguisher; that there was no defect or insufficiency in the workmanship by which said fire extinguisher was constructed; that there was no defect or insufficiency in the rivets or other materials used in the construction of the seam of said fire extinguisher; that there was no defect or insufficiency in the workmanship by which said seam was constructed; that the hose having on one end thereof a nozzle with a shut-off valve therein was a proper and safe appliance to be attached to said extinguisher; that the tests made by the defendant on said fire extinguisher showed that said extinguisher was capable of withstanding internal pressure much greater than any such pressure that could be generated or created within said extinguisher when the same was charged, used, operated and handled in accordance with the said instructions; that said fire extinguisher was not a dangerous but a safe instrumentality when charged, used, operated and handled in accordance with said instructions; that defendant did not commit any breach of any warranty; and that the alleged explosion of said fire extinguisher and the alleged injuries claimed by the plaintiff to have been sustained thereby, were not caused by any negligence of the defendant."

Defendant contends: (1) "The court erred in denying the defendant's motion for the entry of judgment in favor of the defendant notwithstanding the verdict of the jury;" and (2) "The court erred in denying the defendant's motions for the giving of an instruction to the jury to find defendant not guilty."

"'A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489.' (Hunter v. Troup, 315 Ill. 293, 296, 297.)" (Mahan v. Richardson, 284 Ill. App. 493. See, also, Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597; Cooper v. Safeway Lines, Inc., 304 Ill. App. 302, 312, 313; McCarthy v. Rorrison, 283 Ill. App. 129.)

As the foregoing rules also apply to a motion for judgment notwithstanding the verdict (see Rule 22 of the Supreme court) defendants' two contentions may be considered together.

Observing the foregoing rules we find the following evidence: About December 1, 1934, the Village of Euclid, Ohio, purchased from Fire Prevention Equipment Company a fire extinguisher to be used by the firemen of the Village in fighting fires. The extinguisher was manufactured by defendant. Plaintiff was a fireman for the Village and in the course of his duties it was necessary for him, at times, to use the fire extinguisher. The accident to plaintiff happened on July 19, 1936, at which

Defendant contends: (1) "The court erred in denying the defendant's motion for the entry of judgment in favor of the defendant notwithstanding the verdict of the jury;" and (2) "The court erred in denying the defendant's motions for the giving of an instruction to the jury to find defendant not guilty."

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As the foregoing rules also [illegible] motion for judgment notwithstanding the verdict (see rule 72 of the [illegible] court) defendants' two contentions may be considered together.

Observing the foregoing rules we find the following evidence: About December 1, 1934, the [illegible] of a fire extinguisher purchased from the Prevention Equipment Company [illegible] extinguisher to be used by the fireman of the village in fighting fires. The extinguisher was manufactured by defendant. Plaintiff was a fireman for the Village and in the course of his duties it was necessary for him, at times, to use the fire extinguisher. The accident to plaintiff happened on July 14, 1936, at which

time plaintiff had been a fireman for the Village for over fifteen years. Before the accident he had used the extinguisher eleven times. He always cleaned it after he had used it, after which he would refill the tank. He would put into the extinguisher two and one-half gallons of water and the proper amount of soda and sulphuric acid. A cap was then screwed on the top of the extinguisher and the extinguisher was then placed on the rear of the hose wagon. Two days before the accident plaintiff cleaned the extinguisher and filled it with the proper amounts of water, soda and acid, and the extinguisher was not used thereafter until the time of the accident. On July 19, 1936, about 2:45 p. m., the hose truck, with the extinguisher on it, was called to a field fire. Three firemen, including plaintiff, responded to the call. They found a field fire which they put out by the use of brooms. About 3 p. m., as they were returning from that fire, they passed a wire factory and there was a field fire near the factory. Two telegraph poles were burning. One was burning about two feet above the ground and the second one, located about 100 feet away from the first, was burning about six feet above the ground. The fire chief, Earlick, ordered plaintiff to take the extinguisher and put out the two fires. Plaintiff took the extinguisher from the fire truck and used it in putting out the fire on the first pole. He had used about a gallon of the chemical in putting out the fire at the first pole, and in order to save the chemical liquid for use upon the fire at the second pole he shut off the tank, that is, "shut off the hose that was shut off on the chemical hose." When he did so the explosion occurred and as a result plaintiff was severely injured.

Plaintiff testified, inter alia: "A. When I first left the truck I put it [the extinguisher] over my shoulder and started over, walking to one of the poles, and I got it upside down and charged it, and that leaves the acid mixed with the soda water, that gives

time plaintiff had been [illegible] fifteen years. [illegible] times. He always cleaned [illegible] had [illegible] would refill the tank. [illegible] two and one-half gallons of [illegible] and two [illegible] sulphuric acid. [illegible] gusher and the extinguisher was then [illegible] hose wagon. Two days before the accident [illegible] the extinguisher and filled it with the proper [illegible] soda and acid, and the extinguisher was not [illegible] until the time of the accident. [illegible] p. m., the hose truck, with the extinguisher on it, was called to a field fire. Three firemen, including [illegible], responded to the call. They found a field [illegible] use of brooms. About 7 p. m., the firemen [illegible] fire, they passed a wire [illegible] the factory. Two tall wooden poles were [illegible] about two feet above the ground [illegible] 100 feet away from the field, [illegible] ground. The fire [illegible] extinguisher and put out the fire. [illegible] gusher from the fire [illegible] the first pole. [illegible] putting out the fire [illegible] chemical liquid for use [illegible] off the tank, [illegible] the chemical hose." [illegible] a result plaintiff was severely injured.

Plaintiff testified, later [illegible] truck I put it [the extinguisher] [illegible] walking to one of the poles, [illegible] it, and that leaves the [illegible] given

you your pressure. Q. And after you turned it over tell us whether or not you turned down the nozzle. A. Then I turned down the nozzle and I started putting the fire out, I did, put the fire out on the first pole, which was burning about two feet, but as I said before I shut it off to go down to the next pole." The witness further testified that that was the first time he had had occasion to use the shut-off nozzle on the tank, that they did not have to use the extinguisher every time they went to a fire. On cross-examination the witness testified that there was "a nozzle, shut-off on the nozzle of the tanks;" that upon his shift he had charge of refilling the extinguisher; that he charged the extinguisher at the first pole "by tipping it upside down. That is the only way that you can charge those things. * * * Then I laid the extinguisher down and opened up my hose, and I put the fire out. * * * The nozzle was on the end of the rubber hose;" that it took him only a couple of minutes to put out the fire at the first pole and then he shut the nozzle off and was ready to pick up the extinguisher, when he heard the explosion; that upon all other occasions when the extinguisher was used "that tank was always opened up and left open until all the stuff was taken right completely out of the tank;" that he had used the shut-off so as to save some of the liquid for the second pole fire.

Edward J. Kastelic, a witness for plaintiff, testified that he had attended a fire prevention school and made a special study of fire prevention equipment. He had made a study of fire extinguisher construction and had had extensive personal experience in soldering. He had had seventeen years of practical experience in the Euclid fire department and had given instruction in reference to the construction, use and maintenance of the soda and acid type extinguishers. He was familiar with the Diener extinguisher. After returning from the fire in question he immediately made a complete examination of the tank. He found that the

your your pressure. Q. And after you turned the valve, did you whether or not you turned down the nozzle. A. Then I turned down the nozzle and I observed nothing [illegible] I put the fire out on the first [illegible] but as I said before I shut it off to go over to the next hole."

The witness further testified that [illegible] the first time he had had occasion to use the shut-off nozzle on the hose, that they did not have to use the [illegible] they went to a fire. On cross-examination the [illegible] that there was "a nozzle, shut-off on the nozzle of the hose;" that upon his shift he had charge of refilling the extinguisher; that he charged the extinguisher at the first hole "by tipping it upside down. That is the only way that you can charge those things. * * * Then I laid the extinguisher down and opened up my hose, and I put the fire out. * * * [illegible] on the end of the rubber hose;" that it took his only [illegible] minutes to put out the fire at the first pole [illegible] the nozzle off and was ready to pick up the extinguisher, [illegible] explosion; that upon all other occasions [illegible] was used "that tank was always opened [illegible] the stuff was [illegible] had used the shut-off so [illegible] second pole fire.

Edward J. Castello, witness [illegible] that he had attended a fire prevention [illegible] study of fire prevention [illegible] extinguisher construction and [illegible] experience in soldering. He had been [illegible] experience in the Child Fire [illegible] in reference to the construction [illegible] and acid type extinguisher. [illegible] extinguisher. After returning from the fire [illegible] carefully made a complete examination of the tank. He found that the

center section, known as the cylinder section, on the tank body was ruptured at the seam and spread wide open. Together with others connected with the fire department, he examined the hose and nozzle for the purpose of determining whether or not the hose opening was obstructed in any manner. The hose and nozzle were tested with a wire and water was run through them. No obstruction was found, and a full stream went through. The hose and nozzle were then in perfect condition. The hose and nozzle that belonged to the extinguisher in question were afterward placed on another tank and used for some time. When he examined the extinguisher after the accident he observed bright spots on the seam of the extinguisher and on the base. The solder had not adhered to the seam and the rivets had torn in two. The seam and the base were pitted and channelled. The extinguisher in question was introduced as an exhibit by plaintiff and was examined by the court and jury. It is before us as a part of the record upon this appeal. In referring to the appearance of the extinguisher at the time of the trial Kastelic testified as follows: "Over the period of time that has elapsed since the accident has occurred, oxidation has formed on the outside surface of this metal and the inside surface of this metal; it will also form on the surface of that, that is, the tin surface or the lead surface." The witness further testified that the addition of salt into the solution of soda and water in the winter time would not impair the efficiency of the solution nor create any condition that would be hazardous or detrimental. We may state that after a careful examination of the extinguisher we find that the condition and appearance fully corroborate Kastelic's testimony as to its appearance and condition when he examined it after the accident.

Max M. Forsch testified for plaintiff. He was the owner of Fire Extinguisher Service Company and his business was the sale and servicing of fire extinguishers and fire protection devices.

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Max M. Porsch testified for plaintiff. He was the owner of Fire Extinguisher Service Company and his business was the sale and servicing of fire extinguishers and fire protection devices.

He had been in that business for fourteen years. He made repairs on extinguishers for the purpose of bringing them back to their normal safe operating condition. He testified: "We change chemicals in them, and, in short, do everything that is necessary to make the extinguisher dependable, trustworthy and reliable, if it is possible to do it with that extinguisher; otherwise we recommend to people to trade them off on a new extinguisher. * * * I have studied their construction to a large extent and have read up a good bit about the testing of extinguishers and know that each factory requires a 350-pound pressure test on ordinary industrial type of extinguishers, together with a 500-pound pressure test on fire department types." He further testified that when he examined the extinguisher in question four or five days after the accident he "noted that there were a number of spots of clean copper visible both in the under lap of the outside seam and the upper lap of the lower sheet of metal. That is, by that, I mean the part that comes underneath and the part that comes over the top at the lap. * * * That plainly indicated to me that those particular portions of the seam had not had a complete tinning prior to the time that solder was run into the seam. * * * I refer to the longitudinal seam that runs up and down the back of the cylinder and the seam which is split open allowing the metal to unroll itself back to nearly a flat sheet." He further testified that "solder cannot be successfully flowed on to copper unless the surface of the copper has first been tinned. A coat of solder must be thoroughly bonded on to the clean copper surface, which is what we term tinning. The coat of solder or tin assists the solder being flowed into it, tying the two surfaces of the metal together solidly and rigidly. By tinning I mean that you apply a very thin coat of solder to the cleaned copper before you attempt to join the two plates of the seam together. I would say a seam would not be perfectly safe unless the seams were tinned, the laps were tinned before the

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seam was completed." Upon cross-examination the witness stated that when he heard of the accident in question he examined the extinguisher because he was interested in looking at anything of that nature for his own information and whatever he might learn from such experience; that the condition of the extinguisher, as it appeared in court, was as when he examined it after the accident.

Ernest Earlick, the fire chief, testified that after the accident he noticed that "the solder on the side of it [the extinguisher] was not very good." He further testified that while plaintiff was putting out the fire he, the witness, "heard something like a big fire cracker went off and I looked over that way and I seen Kreger down on the ground, so I hollered to the other two boys to get over and see what was the matter and they found that this extinguisher had let go;" that when he "heard the sound like a fire cracker" he saw plaintiff "down on his hands and knees. * * * and I got the other two boys to get him over onto the truck and get him to the fire house as quick as they could, then I went and picked up the extinguisher and carried it across the track to the fire house."

W. P. Runkel, an expert called by defendant, after examining the extinguisher in court, testified: "You find a coating of tin all the way along, occasionally a little lump of solder, very fine ridge here occasionally." Upon the cross-examination the following occurred: "Q. In other words, if after the tank has been charged, Mr. Runkel, and you turn on and use part of the liquid and then turn the nozzle off, the shut-off nozzle, to retain that liquid in that tank, there is an increased pressure inside that tank, isn't there? A. I shouldn't think so. Q. Well, when the nozzle is turned on isn't the pressure pushing out? A. That is right. Q. When you turn it off isn't it concealed in there? A. Sure. Q. All right, and when it is concealed in there the seam of that

seam was completed." Upon cross-examination the witness stated that when he heard of the accident in question he examined the extinguisher because he was interested in looking at anything of that nature for his own information and whatever he might learn from such experience; that the condition of the extinguisher, as it appeared in court, was as when he examined it after the accident.

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tank should be strong enough to conceal that pressure within, shouldn't it? A. Right. Q. And if, when the nozzle is turned off and there is an explosion and that seam bursts - and perhaps that thick metal - to pieces, or apart, there is a weakness in that metal some place, isn't there? A. Right."

George W. Diener, president and treasurer of defendant corporation, testified for defendant. Upon cross-examination the following occurred: "Mr. White [counsel for plaintiff]: Do you make any other type of extinguisher with shut-off nozzles except those sold to the fire departments? Mr. Torney [attorney for defendant]: There is an objection. The Court: He may answer that. A. Yes. Mr. White: What other type? A. A foam type. Q. I mean of the acid solution? A. Oh, no, excepting a break-bottle type. I should correct myself. They do make a break-bottle. That is not a break-bottle. Q. And does it have a nozzle on it? A. That has a nozzle on it. Q. Is that approved by the underwriters? A. It is not."

Defendant in stating evidence in support of its contentions does not observe the rules that govern us in passing upon the contentions. We are satisfied that the contention of defendant that there is no evidence that fairly tends to prove plaintiff's complaint is without the slightest merit. In our consideration of the evidence that bears upon the contentions we have been aided greatly by having before us the extinguisher in question. In passing upon the question as to whether or not the extinguisher was an inherently dangerous instrumentality when sold the jury had a right to find that it was manufactured and sold not for display purposes but for use by firemen fighting fires under all conditions. It is most significant that an explosion occurred the first time that the shut-off nozzle was used by plaintiff while the chemicals were reacting. After the explosion the hose and shut-off nozzle were still in perfect condition, but the riveted and soldered seam on the cylinder

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of the extinguisher had given way, "was ruptured at the seam and spread wide open." The jury had the right to find from these facts that the body of the container was of insufficient tensile strength because of defective construction, or because of a failure on the part of defendant to test fully the effect of the use of the shut-off nozzle. The tinning, riveting and soldering are all hand operations. Defendant appears to argue that in order to make out a prima facie case plaintiff had to show by direct evidence that some employee or employees of defendant were guilty of certain careless acts the result of which was faulty workmanship in the making of the extinguisher. It is a matter of common knowledge that a plaintiff is seldom in a position to prove such fact or facts by direct evidence, but a plaintiff may prove his case by direct or circumstantial evidence, and the evidence produced by plaintiff certainly tends to prove, circumstantially, at least, that defendant, through its servants, was negligent in the construction of the extinguisher. Rotche v. Buick Motor Co., 358 Ill. 507, relied upon by defendant in support of its contention, recognizes the rule that even where the plaintiff does not purchase the article from the manufacturer, nevertheless, where a manufacturer manufactures a product which is inherently and normally dangerous the manufacturer may be liable to the purchaser. Plaintiff argues, with force, that the extinguisher if improperly manufactured is inherently dangerous, and that a nozzle which cannot be closed acts as a safety valve and permits the reacting chemicals and water to escape, but that a machine which is designed to create increasingly large internal pressures without an escape is inherently dangerous if the container is not strong enough to withstand the pressure, and plaintiff calls attention to the testimony of George W. Diener, that Underwriters Laboratory will not approve an acid solution type of extinguisher made by defendant but not sold to fire departments, known as the foam

of the extinguisher not given way, was ruptured at the seam and spread wide open.' The jury had the right to find from these facts that the body of the extinguisher was of insufficient tensile strength because of defective construction, or because of a failure on the part of defendant to test fully the effect of the use of the shut-off nozzle. The finding, however, and soldering are all hard questions. Defendant appears to argue that in order to make out a prima facie case plaintiff had to show by direct evidence that some employee or employees of defendant were guilty of certain careless acts the result of which was faulty workmanship in the making of the extinguisher. It is a matter of common knowledge that a plaintiff is seldom in a position to prove such fact or facts by direct evidence, but a plaintiff may prove his case by circumstantial evidence, and the evidence produced by plaintiff certainly tends to prove, circumstantially, at least, that defendant through its servants, was negligent in the construction of the extinguisher. Rotche v. Quick Action Co., 202 Ill. App. relied upon by defendant in support of its contention, recognizes the rule that even where the plaintiff does not purchase the article from the manufacturer, nevertheless, where a manufacturer manufactures a product which is inherently and normally dangerous the manufacturer may be liable to the purchaser. Plaintiff argues, with force, that the extinguisher if not properly manufactured is inherently dangerous, and that a nozzle which cannot be closed acts as a safety valve and permits the escaping of gas and water to escape, but that [illegible] to create increasingly large internal pressure [illegible] escape is inherently dangerous if the container is not strong enough to withstand the pressure, and plaintiff cites attention to the testimony of George H. Turner, that Turner's Improved Extinguisher will not approve an acid solution type of extinguisher made by defendant but not safe to fire departments, since is the foam

type or "break-bottle" type, that has a shut-off nozzle on it.

In Heckel v. Ford Motor Co., 128 Atl. 242, the court states (p. 243):

"The manufacturer of an article, not inherently dangerous, but which may become dangerous when put to the use for which it is intended, owes to the public the duty of employing care, skill, and diligence in its manufacture and of using reasonable diligence to see that it is reasonably fit for the purpose for which it was intended."

While defendant contends that the verdict and judgment are against the manifest weight of the evidence, its brief devotes but a few lines to this contention, and it is evident that defendant's major contention, so far as the evidence is concerned, is that plaintiff failed to make out a prima facie case. In any event, we are satisfied that we would not be justified in sustaining the instant contention.

Defendant contends that the trial court erred in giving to the jury plaintiff's instruction number 6. The criticism of the instruction is that it "omits the essential element of use of the extinguisher in question according to the instructions therefor contained on said extinguisher." The instruction relates solely to the question of warranty and it states correctly the law bearing upon that question. An instruction given to the jury at the instance of defendant also relates solely to the question of warranty. We are satisfied that special instructions numbered 13, 18, 19 and 20, given at the instance of defendant, fully and fairly cover all special questions of law upon which defendant relied.

Defendant contends that the trial court erred in giving plaintiff's instruction number 8. That instruction relates to the question of damages. It is a stock instruction and has been approved many times. Defendant's criticism is that it submits to the jury, inter alia, the question of the amount of money

type or "broom-bottle" type, that has a wire-off nozzle on it.

In Wenkel v. Fox Boston Co., [illegible] 242, the court states (p. 243):

"The manufacture of an article, not dangerously dangerous, but which may become dangerous due to the use for which it is intended, owes to the maker the duty of employing care, skill, and diligence in the manner and of making reasonable diligence to see that it is reasonably fit for the purpose for which it was intended."

While defendant contends that the manufacturer and jobber are against the manifest weight of the evidence, its brief devotes but a few lines to this contention, and it is evident that defendant's major contention, so far as the evidence is concerned, is that plaintiff failed [illegible] case. In any event, we are satisfied that [illegible] not be justified in sustaining the instant contention.

Defendant contends that the trial court erred in giving to the jury plaintiff's instruction number [illegible]. The criticism of the instruction is that it "omits the essential element of use of the extinguisher in question and [illegible] the instructions therefor contained no said attributable." The instruction relates solely to the question of [illegible] in it states correctly the law bearing upon that question. The instruction gives to the jury at the instance of defendant [illegible] solely to the question of warranty. We are satisfied that [illegible] instructions numbered 1½, 1[illegible] and [illegible], [illegible] of defendant, fully and fairly cover [illegible] law upon which defendant relies.

Defendant contends that the trial court erred in giving plaintiff's instruction number [illegible]. That instruction relates to the question of damages. It is [illegible] and has been approved many times. Defendant's criticism is that it submits to the jury, inter alia, the question of the amount of money

necessarily expended or for which plaintiff was liable for doctors' bills without limiting such supposed doctors' bills to plaintiff's alleged injuries. The instruction several times states that the jury may award only such damages as plaintiff has sustained or will sustain as a direct result of the consequences of the injury, if any. Instruction 21, given at the instance of defendant, covers the subject matter of damages fully and correctly. But defendant also contends that there is no direct evidence that plaintiff paid or became liable for doctors' bills and that a jury should not be allowed to speculate thereon. While there is considerable evidence as to the medical and surgical treatment that plaintiff received, we do not find in the record any definite proof as to doctors' bills. However, in our judgment, the remittitur of $4,500 that the trial court compelled plaintiff to enter more than protected defendant's rights in the matter of damages. Defendant strenuously contends that even the damages awarded plaintiff in the judgment, $8,000, are excessive. As defendant, in its argument in support of this contention, does not fairly state all of the evidence that bears upon the question of damages we deem it necessary to state rather fully the evidence that bears upon that subject.

Plaintiff testified that immediately after the explosion he "was kind of stunned, it just seemed something got hold of my both ears and blocked them. I couldn't hear nor I couldn't see;" that he was taken to the fire house, where he was given first aid treatment; that his hand and arm were bleeding and he could not stand very well "because my right leg had a hole in it;" that he was then taken to the Emergency Clinic hospital in the chief's car, where two of his fingers were sewed up, the middle finger and the one next to the little finger; that his face was scratched and pitted with cinders; that his whole face was burned and his eyes bothered him; that during the time he was in the Emergency hospital he could not see; that an X-ray was taken of his left

necessarily expended or for which plaintiff was liable for doctors' bills without limiting such supposed doctors' bills to plaintiff's alleged injuries. The instruction several times states that the jury may award only such damages as plaintiff has sustained or will sustain as a direct result of the consequences of the injury, if any. Instruction 21, given at the instance of defendant, covers the subject matter of damages fully and correctly. But defendant also contends that there is no direct evidence that plaintiff paid or became liable for doctors' bills and that a jury should not be allowed to speculate thereon. While there is considerable evidence as to the medical and surgical treatment that plaintiff received, we do not find in the record any definite proof as to doctors' bills. However, in our judgment, the remittitur of $4,500 that the trial court compelled plaintiff to enter more than protected defendant's rights in the matter of damages. Defendant strenuously contends that even the damages awarded plaintiff in the judgment, $8,000, are excessive. As defendant, in its argument in support of this contention, does not fairly state all of the evidence that bears upon the question of damages we deem it necessary to state rather fully the evidence that bears upon that subject.

Plaintiff testified that immediately after the explosion he "was kind of stunned, it just seemed something got hold of my both ears and bloomed them. I couldn't hear nor I couldn't see;" that he was taken to the fire house, where he was given first aid treatment; that his hand and arm were bleeding and he could not stand very well "because my right leg had a hole in it;" that he was then taken to the Emergency Clinic hospital in the chief's car, where two of his fingers were sewed up, the middle finger and the one next to the little finger; that his face was scratched and pitted with cinders; that his whole face was burned and his eyes bothered him; that during the time he was in the Emergency hospital he could not see; that an X-ray was taken of his left

arm and he was given medicine to relieve the pain and put him to sleep; that he was in that hospital for about fourteen or fifteen days; that he was charged $4.50 a day for his room; that the doctor who attended him tried four different times to set his left arm but failed to do so; that finally the arm was placed in a plaster cast that extended from the shoulder to the tip of the fingers; that the cast was on for about two days, when they took an X-ray picture and found the bone had slipped out of place; that they could not get the two bones in his arm to come together and stay there, and each time they would have to take the cast off and reset the arm and then put another cast on it, and in a couple of days an X-ray would show "that it was slipped again" and they would go through the same procedure; that when they failed to make the bones meet they stretched his left arm by a hanger, "that is a frame over the bed and they had large pulleys on it and a rope come down and they had a kind of big thing fastened over my left wrist and they had a big iron weight" that pulled his left arm up straight over his head; that this procedure lasted seven or eight days and he got so he could not eat nor sleep and he became so weak that he had his family doctor come and take him away from that hospital and take him to another hospital; that the cut on his right leg healed up while he was at the clinic hospital, and at the time of the trial he had no trouble with that leg; that he spent fourteen or fifteen days at the first hospital and he then went home, where he remained for a day and a night; that his arm was in a sling; that he then went to the Huron Road hospital, at East Cleveland, where he was attended by Dr. Biddinger; that an X-ray was taken of his arm and it was found necessary to wire the parts of the bone together; that he was under an anaesthetic while the wiring was being done and the plaster of Paris cast was placed on his arm from the shoulder to the finger tips; that the cast remained upon the arm until the middle of September;

arm and he was given medicine to reduce the pain and put him to sleep; that he was in that hospital for about fourteen or fifteen days; that he was discharged [illegible] a day for his room; that the doctor who attended him tried four different times to set his left arm but failed to do so; that finally the arm was placed in a plaster cast that extended from the shoulder to the tip of the fingers; that the cast was on for about two days, when they took an X-ray picture and found the arm had slipped out of place; that they could not get the bones in his arm to come together and stay there, and such that they would have to take the cast off and reset the arm and then put another cast on it, and in a couple of days an X-ray would show "that it was slipped again" and they would go through the same procedure; that when they failed to make the bones meet they attached his left arm by a hanger, "that is a frame over the bed and they had large pulleys on it and a rope come down and they had a kind of big thing fastened over my left wrist and they had a big iron weight" that pulled his left arm up straight over his head; that this procedure lasted seven or eight days and he got so he could not eat nor sleep and he became so weak that he had his family doctor come and take him away from that hospital and take him to another hospital; that the cut on his right leg healed up while he was at the clinic hospital, and at the time of the trial he had no trouble with that leg; that he spent fourteen or fifteen days at the first hospital and he then went home, where he remained for a day and a night; that his arm was in a sling; that he then went to the Huron Road hospital, at East Cleveland, where he was attended by Dr. Giddings; that an X-ray was taken of his arm and it was found necessary to wire the parts of the bone together; that he was under an anesthetic while the wiring was being done and the plaster of Paris cast was placed on his arm from the shoulder to the finger tips; that the cast remained upon the arm until the middle of September;

that while the cast was on he suffered a lot of pain; that it kept burning all the time, especially at night; that it was difficult to get his arm in a position where he could get any rest; that he was given medicine for pain and to help him to sleep; that after he left the hospital he went to Dr. Biddinger's office twelve or fifteen times; that during this time the doctor, upon each visit, would cut off a little bit of the cast; that after the cast was taken completely off the doctor gave plaintiff a ball and told him to try to work the ball so as to get his fingers loosened up, and that he used that ball for about two or three months; that three or four times a day he bathed his arm in hot water, after which the arm would be rubbed with alcohol; that he returned to the fire department on September 29 but that he was unable to carry on the duties that he performed prior to the accident; that for the first year after he returned to duty he could not use the arm at all and they had him take care of school children at crossings; that after the first year his thumb and first finger loosened up, "but these fingers here I can't get down any further than that. I can't bend them at all, and I can't hold anything * * * the first finger and my thumb I can close, but these here I can't do anything with, these three fingers. * * * The little finger, the middle finger and the one next to the little finger; those three. Q. When you attempt to close them tight what if anything did you say you felt? A. Just as soon as I go to close those fingers you can see my arm swell up in here." (Here the witness was allowed to roll up his sleeve and show his arm to the jury.) "Q. Now, holding that position, and pointing to this bump on your left forearm above the wrist, did you have that bump there before this explosion of July 19, 1936? A. No, sir, I did not. That is where those bones are wired together with the silver wires." The witness then testified that the linear scar at the top of his left forearm was the result of the suture that was put

that while the cast was on he [illegible] saying that it kept burning all the time, especially during that it was difficult to get his arm in a position where he could get any rest; that he was given medicine for pain and to help him to sleep; that after he left the hospital he went to Dr. [illegible] surgeon office twelve or fifteen times; that during each time the doctor, upon each visit, would cut off a little at the end; that after the cast was taken off, Dr. [illegible] gave plaintiff a bath and told him to try to work his [illegible] as to get his fingers loosened up, and that he used that [illegible] for about two or three months; that three or four [illegible] medical aid and in wet water, after which the arm could be [illegible] alcohol; that he returned to the fire department on [illegible] but that he was unable to carry on the duties that he performed prior to the accident; that for the first year after he returned to duty he could not use the arm at all and they had his [illegible] of school children at crossings; that after the [illegible] his thumb and first finger loosened up, "but those fingers hung [illegible] down any further than that. I couldn't bend them at all, and I couldn't hold anything [illegible] close, but those here I can't do anything with, these three fingers. * * * The little finger, [illegible] finger and the one next to the little finger; close [illegible]. [illegible] to close them right when it [illegible] just as soon as I go to close [illegible] swell up in here." ("Here [illegible] to roll up his sleeve and show his arm to the jury.") [illegible] that position, and [illegible] above the wrist, [illegible] explosion of July 1, 1920? A. No, sir, I didn't. That is where those bones are wired together [illegible]." The witness then testified that the [illegible] of his left forearm was [illegible] the surface that was put

there at the time the arm was operated on and that the wires that were used to keep the two bones together are still in his arm. The witness then stated that after the year in which he did crossing duty he was put on light duty on the trucks. "What I mean by light duty is not hanging on the truck, I sat up on the seat when they went to the fire and if they needed an axe or anything of that kind, or tool, I would go out to the truck and bring the tools for the men to use them. I was in no shape to use them myself."

Dr. John B. Hanson, a witness on behalf of plaintiff, testified that he was connected with the Emergency Clinic hospital and that plaintiff was under his care at the hospital from Sunday afternoon, July 19, until Monday morning, July 20, when plaintiff came under the care of other doctors at the clinic; that he found upon examination that plaintiff had severe lacerations on the left hand and fingers and that as a result of his examination of an X-ray that had been made he found that the left arm of plaintiff was badly fractured; that he could tell that the arm was badly fractured before he saw the X-ray; that plaintiff at the time he saw him was suffering from shock and that he, the witness, "at that time treated his shock, and then we gave him 15,000 units of tetanus antitoxin so he wouldn't get lockjaw and blood poison;" that plaintiff's arm was put in a temporary splint "to keep the bone fragments as quiet as they could, so they wouldn't be rubbing on each other and jagging into the nerves and muscles and blood vessels," and the arm was elevated "to relieve the congestion which would occur from the trauma to the torn blood vessels, the return venous supply is aided by having the arm elevated;" that he "then determined that there was some injury to the blood vessels and nerves. The patient was in considerable pain at that time. We had to change the nebutaol treatment to morphine to sufficiently stop the pain."

Dr. A. C. Biddinger, a witness for plaintiff, testified,

there at the time the arm was operated on and the wires that were used to keep the bones together were still in his arm. The witness then stated that after the year in which he did crossing duty he was put on light duty in the bureau. "What I mean by light duty is not hanging on the bars, I went up on the east when they went to the fire and if they needed an axe or anything of that kind, or tool, I would go out to the truck and bring the tools for the men to use them. I was in no shape to use them myself."

Dr. John E. Hanson, a witness on behalf of plaintiff, testified that he was connected with the Morningside Clinic hospital and that plaintiff was under his care at the hospital from Monday afternoon, July 13, until Monday morning, July 20, when plaintiff came under the care of other doctors at the clinic; that he found upon examination that plaintiff had severe lacerations on the left hand and fingers and that as a result of his examination of an X-ray that had been made he found that the left arm of plaintiff was badly fractured; that he could tell that the arm was badly fractured before he saw the X-ray; that plaintiff at the time he saw him was suffering from shock and that the witness, at that time treated his shock, and gave him 15,000 units of tetanus antitoxin to be sure that he had not got tetanus or blood poison; that plaintiff's arm was not in a condition at that to keep the bone fragments as quiet as they could, so they couldn't be rubbing on each other and jagging into the nerves and muscles and blood vessels," and the arm was elevated "to relieve the congestion which would occur from the trauma to the deep blood vessels, the return venous supply is aided by having the arm elevated;" that he "then determined that there was some injury to the blood vessels and nerves. The patient was in considerable pain at that time. We had to change the medication to morphine to sufficiently stop the pain."

Dr. A. C. Bidelingen, a witness for plaintiff, testified,

by deposition, that he was on the surgical staff at Huron Road hospital since 1919, and that he had professional contact with plaintiff on October 4, 1936; that he examined plaintiff's left arm to determine its condition; that he had a fracture of the radius of the left forearm and X-rays were taken (these X-rays were admitted in evidence by stipulation and the jury were allowed to examine them.) The witness further testified that "an open reduction would be necessary as the bones apparently had some soft tissues in between the ends of the bones, and the X-rays showed a deformity and overriding of the ends of the bones;" that an open reduction means "an incision of the site of the fracture, soft tissues removed from the end of the bones, the bones coaptated and fastened together. Q. Did you perform that operation? A. I did. Q. You made an incision in the arm? A. I did. Q. And exposed the bone, that is the radius, where you could see it, or feel it? A. I did. Q. And having made that incision, what, if anything, did you find? A. Found soft tissue, mostly muscular tissue, interposed between the ends of the bone. Q. That is where the break had occurred? A. That is right. Q. Did you find anything else there, any other conditions? A. Tissues are bruised and bloody and damaged from the contusion. Q. Does that mean that the bones, the ends of the bone, had not knit, as we say in layman's language? A. No, they had not united, could not unite as long as the soft tissue was interposed between them. Q. Now, Doctor, what, if anything, did you do to improve the situation? A. We removed the soft tissues from the ends of the bones, coaptated the fresh ends together and wired them together;" that before wiring the ends of the bones together they were curetted, scraped, and after the wiring they were secured with a plaster of Paris splint; that plaintiff remained in the hospital about four days and when he left the arm was in good position, the ends of the bone were still fastened together, and the cast was still on his arm;

by deposition, that he was on the surgical staff at Huron Road hospital since 1919, and that he has professional contact with plaintiff on October 4, 1930; that he examined plaintiff's left arm to determine the condition that he had [illegible] of the radius of the left forearm and X-rays were taken (these X-rays were admitted in evidence by stipulation and the jury were allowed to examine them.) The witness further testified that "an open reduction would be necessary as the bones apparently had some soft tissues in between the ends of the bones, and the X-rays showed a deformity and overriding of the ends of the bones;" that an open reduction means the incision of the site of the fracture, soft tissues removed from the ends of the bones, the bones coaptated and fastened together. Q. Did you perform that operation? A. I did. Q. You made an incision in the arm? A. I did. Q. And exposed the bone, then in the region, where you could see it, or feel it? A. I did. Q. In having made that incision, what, if anything, did you find? A. Found soft tissue, mostly muscular tissue, interposed between the ends of the bone. Q. That is where the break had occurred? A. That is right. Q. Did you find anything else there, any other conditions? A. Tissues are bruised and bloody and damaged from the contusion. Q. Does that mean that the bones, the ends of the bone, had not knit, as we say in layman's language? A. No, they had not united, could not unite as long as the soft tissue interposed between them. Q. Now, Doctor, what, if anything, did you do to improve the situation? A. We removed the soft tissues from the ends of the bones, coaptated the fragments together and wired them together; that before [illegible] the ends of the bones together they were crushed, [illegible] and after the wiring they were secured with a plaster of Paris splint; that plaintiff remained in the hospital about four days and when he left the arm was in good position, the ends of the bone were still fastened together, and the cast was still on his arm;

that plaintiff was then discharged from the hospital; that he saw plaintiff after he left the hospital at his office; that several weeks after plaintiff left the hospital he removed the plaster cast from the arm; that at that time the union of the bones was excellent, "position of the bones was good. The arm was - the motion of the arm was somewhat limited. Q. To what extent was it limited, Doctor? A. Oh, it was stiff and the muscles were not flexible, the same as they always are following a protracted time in a cast or splint;" that after that he saw plaintiff once a week for about six weeks at his office; that in October he found that the bones were healed and that "there was some limitation of motion of the little finger, ring finger and middle finger. * * * The reason for it was the damage to the nerve and muscular tissue. Q. Was that damage in any way related to the accident which caused the break in the radius? A. It was directly due to the damage. Q. Caused by the break? A. Yes." The witness further testified that the last time he examined plaintiff's arm was about October 1, 1938, and that at that time "he still had limitation of motion of the little finger and the ring finger and middle finger. Q. What was that condition with respect to the condition that you found at about October 1, 1936? A. It had improved some, but very slightly;" that he examined plaintiff just before he went on the stand to testify and found "practically no improvement" in his condition; that "the arm, forearm itself, is perfectly straight. The hand is slightly drawn to the thumb side due to the muscular action on that side and muscular relaxation on the other side. * * * it has more tone on the thumb side and less tone on the finger side;" that less tone on the finger side is due to nerve damage at the time of the explosion; that at the time he removed the plaster cast the wrist was "stiff, not very flexible. * * * That was due to the injury and due to the fact that the arm had been in a plaster cast;" that four weeks after that examination he found the wrist still stiff, "due to the

that plaintiff was then discharged from the hospital; that he saw plaintiff after he left the hospital, [illegible] that several weeks after plaintiff left the hospital he removed the plaster cast from the arm; that at that time the motion of the bones was excellent, "position of the bones was good. The arm was - the motion of the arm was somewhat limited. Q. To what extent was it limited, Doctor? A. Q. It was stiff and the muscles were not flexible, the same as [illegible] having been following a protracted time in a cast or splint." [illegible] after that he saw plaintiff once a week for about six weeks [illegible] his office; that in October he found that the bones were [illegible] that "there was some limitation of motion of the little finger, ring finger and middle finger. * * * The reason for it was the damage to the nerve and muscular tissue. Q. Was that damage in any way related to the accident which caused the break in the radius. [illegible] was directly due to the damage. Q. Caused by the [illegible] Yes. The witness further testified that the last time he examined plaintiff's arm was about October 1, 1936, and that at that time "the stiff and limitation of motion of the little finger and the ring finger and middle finger. Q. What was that condition with respect to the condition that you found at about October 1, 1936? A. It had improved some, but very slightly;" that [illegible] examined plaintiff just before he went on the stand [illegible] "Practically no improvement" in his condition; that "the arm, however itself, is perfectly straight. The hand is slightly [illegible] to the ulnar side due to the muscular action on that side and muscular relaxation on the other side. * * * It has more tone on the ulnar side and less tone on the finger side;" that [illegible] on the finger side is due to nerve damage at the time of the dislocation; that at the time he removed the plaster cast [illegible] "stiff, not very flexible. * * * That was due to the injury [illegible] to the fact that the arm had been in a plaster cast;" that [illegible] four weeks after that examination he found the wrist still stiff, due to the

injury, of course, * * * to the bruising of the soft tissue * * * tendons, muscles, nerves, everything but bone;" that it was difficult to determine exactly the amount of damage, that time alone would determine that; that in October, 1938, the wrist was still slightly stiffened and that at that time he came to the conclusion "that the damage at that time, limitation of motion, was permanent;" that as the result of the examination he made just before he took the stand he came to the conclusion that the condition was permanent and that as a result of the condition of the arm plaintiff will suffer some neuralgia or pain in the arm, especially when it gets cold. Upon cross-examination the doctor testified that it was possible that plaintiff might fool him in the matter of his ability to flex the finger and that the same is true as to the rotation of the wrist. Upon re-direct examination the doctor testified that if there is genuine loss of or limitation of movement of any muscle it will result in atrophy of that muscle and that he had determined that plaintiff "had an atrophy on the little finger side of his hand." "Q. Does that pertain only to the little finger or to any other fingers? A. Well, it extends over to the middle of the hand. Q. Is that atrophy visible from the outside of the hand? A. It is. Q. And you can tell by examination. Is it distinct and unmistakable? A. Distinct atrophy."

Defendant offered no evidence that bears upon the question of plaintiff's injuries and we are satisfied that we would not be justified in holding that the damages are excessive. It must be borne in mind that plaintiff is a fireman and that to be useful in his work it is necessary that he be able-bodied.

Defendant has had a fair trial and the judgment of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

[illegible]

42208

321 I.A. 203

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CHARLES B. PERIOLET,
Appellee,

v.

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO et al.,
Defendants.

Aaron Colnon, Receiver,
(Defendant)
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

~~295~~ 235

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action for personal injuries sustained by plaintiff. By stipulation the cause was dismissed as to defendant City National Bank and Trust Company of Chicago. A jury returned a verdict finding defendant, Aaron Colnon, Receiver, guilty and assessing plaintiff's damages at $2,750. Said defendant appeals from a judgment entered upon the verdict.

This case seems to have been well tried. The only contentions raised by the able and experienced counsel for defendant are: "a. The Court erred in overruling the motion of the defendant to withdraw the evidence from the jury and instruct the jury to find the defendant not guilty at the close of all the evidence. b. The court erred in refusing to grant defendant's motion for a judgment notwithstanding the verdict."

"'A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's

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"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence is demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence in such a case, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's

declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489.' (Hunter v. Troup, 315 Ill. 293, 296, 297.)" (Mahan v. Richardson, 284 Ill. App. 493. See, also, Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597; Cooper v. Safeway Lines, Inc., 304 Ill. App. 302, 312, 313; McCarthy v. Rorrison, 283 Ill. App. 129.)

As the foregoing rules also apply to a motion for judgment notwithstanding the verdict (see Rule 22 of the Supreme court) defendant's two contentions may be considered together.

Defendant, in his argument in support of the two contentions, does not observe the foregoing rules as to the evidence to be considered. He not only cites rebuttal evidence that he introduced but calls attention to alleged impeaching evidence. Obeying the rules that govern us, we find the following evidence:

Aaron Colnon, Receiver, was the landlord of the four-story building at the northwest corner of Lake and Clark streets and had control of the entire building save the parts that were leased to tenants. As such receiver he made a written lease of a certain part of said building to plaintiff and Mike J. State. The three upper floors of the building were rented to a tenant who operated a hotel. The first floor of the building, both on the Clark street side and the Lake street side, was rented to tenants for store purposes. The store at 208 North Clark street was leased to plaintiff and State, to be used for a restaurant. The lease describes the premises leased as "Store at 208 North Clark Street." The lobby of the hotel was on the second floor. There was a light or air court in the center of the building that extended from the ground "to the sky." There was a doorway leading from the second floor of the hotel, which opened out onto

declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Ing v. Ings, 275 Ill. 414; McCune v. Gerhardt, 276 id. 1; Ing v. Ingv v. Ingv, 273 id. 489; (Burter v. Green, 182 Ill. 213, 216, 217.)" (Mahan v. Richardson, 234 Ill. 199, 201. See, also, Lofgren v. Curtiss County Co., 241 Ill. 1, 5, 6, 9; Cooper v. Safeway Lines, Inc., 304 Ill. App. 108, 116; McCarthy v. Jordan, 283 Ill. App. 129.)

As the foregoing rules also apply to a motion for judgment notwithstanding the verdict (see Ill. 41 of the Supreme court) defendant's two contentions may be considered together.

Defendant, in his argument in support of the two contentions, does not observe the foregoing rules as to the evidence to be considered. He not only cites rejected evidence that he introduced but calls attention to alleged supporting evidence. Obeying the rules that govern us, we find the following evidence:

Aaron Golman, Receiver, was the landlord of the four-story building at the northwest corner of Lake and Clark streets and had control of the entire building save the parts that were leased to tenants. As such receiver he made a written lease of a certain part of said building to Plaintiff and Mike A. State. The three upper floors of the building were rented to a tenant who operated a hotel. The first floor of the building, both on the Clark street side and the Lake street side, was rented to tenants for store purposes. The store at 30[illegible] North Clark street was leased to Plaintiff and State, for the use for a restaurant. The lease describes the premises leased as "Store at 30[illegible] North Clark Street." The lobby of the hotel was on the second floor. There was a light or air court in the center of the building that extended from the ground "to the sky." There was a doorway leading from the second floor of the hotel, which opened out onto

an iron stairway which led down to a platform at the rear door of plaintiff's restaurant. There was a wooden stairway that led from this platform to the basement, and at the bottom of that stairway there were two doors, one opened into the boiler room and the other opened into the basement under plaintiff's store. There were no other openings into this air court. The lease to plaintiff and State was signed on August 14, 1937, and ran from October 1, 1937, to September 30, 1940, but a key to the front door of the restaurant and possession of the premises were given to lessees on August 15, 1937, and they immediately commenced repairing the premises. Plaintiff observed the iron stairway and the wooden stairway that led to the basement; also the two doors at the bottom of the wooden stairway, which he found unlocked. He had used the iron stairway and the wooden stairway before the accident. He often saw the colored porter using both stairways in carrying paper and rubbish to the boiler room. He found that the basement had "a dirt floor" and "rafters, no partitions." It was not rented. In the basement under plaintiff's store were a number of gas and electric meters. One of the gas meters and one of the electric meters were used to service plaintiff's store. On the day of the accident plaintiff arranged with an electrician to give him an estimate of the cost of connecting a meter in the basement with the store, and plaintiff and the electrician were going down the wooden stairway to look at the meters when the accident occurred. While they were descending the stairway one of the steps of the same tilted upward, causing plaintiff to be thrown down the stairway, and he sustained the injuries for which he sued. It was found that four nails that fastened the tread to the wooden supports were rusted and "had no holding power at all." There was evidence that employees of the hotel used the stairway in going to the basement to attend to the boiler, to receive oil, to check meters, and to dispose of rubbish. Employees of the gas

an iron stairway [illegible] to [illegible] of plaintiff's [illegible]. [illegible] from this platform to the basement, [illegible] stairway there were one room, [illegible] and the other owned [illegible]. There were no other occupants [illegible] plaintiff and there was signed an [illegible] October 1, 1937, to begin [illegible] door of the basement and possession of the premises given to lessees on August 1, 1937, [illegible] repairing the premises. [illegible] and the wooden stairway which led to the basement also the two doors at the bottom of the iron stairway [illegible] loosed. He had used the iron stairway [illegible] before the accident. He often [illegible] stairways in carrying paper [illegible] found that the basement had "a dirt floor" and "rafters, no partitions." It was not [illegible]. In the basement there plaintiff's store was a number of gas and electric meters. One of the gas meters and one of the electric meters [illegible] service plaintiff's store. [illegible] of the [illegible] arranged with an electrician to give him an estimate of the cost of connecting a meter in the basement with the [illegible], and plaintiff and the electrician went [illegible] to look at the meters when the accident occurred. [illegible] descending the stairway, one of [illegible] stepped backward, causing plaintiff to be thrown [illegible], and he sustained the injuries, for which he [illegible]. [illegible] four walls that fastened the [illegible] orth [illegible] matted and "had no noticeable [illegible]." [illegible] that employees of the hotel had the [illegible] to the basement to attend to the boilers, to make live oil, to clean meters, and to dispose of rubbish. Employees of the gas

company testified that it was their duty to read the meters in the basement and that it had been their practice prior to the happening of the accident to proceed through the hotel, down the stairway and into the basement, for the purpose of reading the meters. There was evidence also that the man who delivered oil to the hotel for use in the furnace in the basement entered the building through the hotel and then descended the two stairways to the basement in order to open the man-hole in the Clark street sidewalk so that the oil could be delivered to the basement. Guests of the hotel testified that they had often seen gas men go down the stairways to the basement and the boiler room.

Defendant states his theory of the case as follows: "First, that the stairway immediately adjacent to the back door of the demised restaurant was an appurtenance to the demised premises to the plaintiff and that therefore the defendant was under no obligation or duty to the plaintiff to keep and maintain the stairway in any particular condition; second, that if the stairway was not a part of the demised premises or an appurtenance to it, that the plaintiff was using the stairway not as an invitee but by implied permission only and it being by permission, he was a mere licensee on the premises and assumed the risks of the conditions there existing. It is further the contention of the defendant that the stairway in question was not a common stairway for the use of tenants or the public." The law bearing upon the facts of this case and defendant's contentions is well established. To cite a late case, Murphy v. Illinois State Trust Co., 375 Ill. 310, 313, 314:

"The rule is that where only a portion of the premises is rented and the landlord retains control of other parts of the same such as stairways, passageways, or cellarways, or where he rents the premises to several tenants, retaining control over a part of the same for the common use of the several tenants, he has the duty of exercising reasonable care to keep the premises

company testifies that it was clear that [illegible] the [illegible] in the basement and that it had been [illegible] prior to the happening of the accident to [illegible] the [illegible], and the stairway and into the basement, for the purpose of [illegible] the motors. There was evidence also [illegible] delivery oil-to the hotel for use in the furnace in the basement of the building through the hotel and then [illegible] the stairways to the basement in order to open the [illegible] hole in the floor adjacent sidewalk so that the oil could be delivered to the basement. Guests of the hotel testified that they had often seen [illegible] go down the stairways to the basement and [illegible] other rooms.

Defendant at the [illegible] of the case [illegible] following:

"First, that the stairway [illegible] adjacent to the back door of the demised restaurant was an appurtenance to the demised premises to the plaintiff and that the [illegible] the defendant was under no obligation or duty to the [illegible] to keep and maintain the stairway in any particular condition; second, that if the stairway was not a part of the demised premises or an appurtenance to it, that the plaintiff was [illegible] stairway not in an invitee but by implied permission only, and it is the [illegible] a more licensee [illegible] the [illegible] of [illegible] conditions there existing. It is [illegible] the duty of the defendant that the stairway [illegible] was not a [illegible] for the use of tenants or the public." [illegible] the facts of this case and [illegible] the [illegible] ed. To cite a late case, [illegible] v. [illegible], 27 N.E. 320, [illegible]:

"The rule is [illegible] the [illegible] is render and the [illegible] of the same such as stairways, [illegible], or elevators, or where he rents the premises to several tenants, a [illegible] control over a part of the area for the common use of the several tenants, he has the duty of exercising reasonable care to keep the premises

in a reasonably safe condition and he is liable for an injury which results to persons, lawfully in such place, from failure to perform such duty. Shoninger Co. v. Mann, 219 Ill. 242."

The lease in question and the evidence show that the contention of defendant that the wooden stairway was an appurtenance to the demised premises to the plaintiff is without merit. It is a matter of common knowledge that gas and electric meters are placed in the basement of a building, whether it be large or small, and there is evidence in the present case that the landlord maintained and controlled this wooden stairway for the common use of the several tenants of the building. Defendant, in his brief, states: "We admit that where a landlord leases separate portions of the same building to different tenants and reserves under his control those parts of the building and premises used in common by all the tenants, such as stairs, passageways and hallways, that the landlord is under an implied obligation to use reasonable diligence to keep in a safe condition the parts of which he reserves control."

We are satisfied that there is sufficient evidence in the record that fairly tends to prove plaintiff's complaint, and, therefore, the two contentions raised by defendant cannot be sustained.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

in a reasonably safe [illegible] is [illegible] which results to [illegible] to perform such duty. [illegible] v. [illegible] L. [illegible] 548.

The issue in [illegible] contribution of defendant [illegible] negligence to the defined [illegible] work merit. It is a matter of [illegible] whether the [illegible] machines are placed in the [illegible] large or small, and there is evidence in the [illegible] the landlord maintained [illegible] controlled this [illegible] for the common use of the owner [illegible] of the building. [illegible] and, in his brief, states: "[illegible] leases separate portions of the [illegible] tenants and reserves under his control [illegible] of the building and premises used in common [illegible] such as stairs, passageways and [illegible] is under an implied obligation to use reasonable diligence to keep in a safe condition the [illegible] over which he reserves control."

We are satisfied that [illegible] in the record that [illegible] and, therefore, the [illegible] be sustained.

The judgment of the [illegible] court of [illegible] in affirmed.

[illegible]

Friend, P. J., and [illegible], concur.

42738

321 I.A. 303

EDWARD GOOD,
Appellee,

v.

LOUIS BEHRENDT,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by him on account of defendant's negligence in driving an automobile which struck and injured plaintiff. There was a jury trial, a verdict and judgment in plaintiff's favor for $5,520 and defendant appeals.

The record discloses that about 12 o'clock midnight, Saturday, October 12, 1941, plaintiff, a single man about 51 years old who lived at 2646 N. St.Louis avenue, with his brother-in-law, left his home for a short walk. He walked east and then north to Diversey boulevard, which is a four-lane through east and west street at 2800 north, turned west on Diversey, stopped at a tavern on the north side of that street, had two or three beers and at 1:30 o'clock in the morning, left the tavern and walked west on the north sidewalk of Diversey to a point about opposite the east side of St.Louis avenue, a north and south street which extends south from Diversey but not north of it. At this point the roadway of Diversey was about 45 feet wide the north two lanes for westbound traffic and the two south lanes for traffic in the opposite direction. Plaintiff testified to the foregoing facts and further, that when he was on the north sidewalk of Diversey he looked to the east and saw no traffic coming in the street. He then looked to the west and saw the lights on an approaching automobile about a block away, He proceeded straight south across Diversey, did not again look towards the west until he was a

EDWARD GOOD,
Appellee,

v.

LOUIS RUDNEMOF,
Appellant.

MR. PRESIDING JUSTICE [illegible]

Plaintiff brought an action [illegible] to recover damages for personal injuries claimed to have [illegible] on account of defendant's negligence in driving an automobile which struck and injured plaintiff. There was [illegible] verdict and judgment in plaintiff's favor for [illegible] dollars.

The record discloses that about 10 o'clock [illegible] October 12, 1941, plaintiff, a single man about [illegible] years old, lived at 2040 N. Sedgwick avenue, with his brother-in-law, [illegible] home for a short while. He walked east [illegible] boulevard, which is a four-lane thoroughfare [illegible] north, turned west on Diversey, stopped [illegible] of that street, had two or three beers [illegible] morning, left the tavern and walked west on the north side of Diversey to a point about opposite the [illegible] a north and south street which extends some [illegible] north of it. At this point the roadway of Diversey [illegible] wide the north two lanes for westbound traffic [illegible] lanes for traffic in the opposite direction. [illegible] the foregoing facts and further, that when [illegible] walk of Diversey he looked to the east [illegible] the street. He then looked to the west [illegible] approaching automobile about [illegible] across Diversey, did not again look toward [illegible]

few feet south of the center of the roadway when he then saw the automobile which was within 5 or 10 feet from him. He was struck by the left front fender of defendant's automobile and severely injured.

On behalf of defendant, the testimony in substance is that defendant and his wife and two other women had been to an entertainment at a church some distance west of St. Louis avenue and they were returning, driving on the inner lane just south of the center line of the pavement of Diversey boulevard at from 20 to 25 miles an hour. Defendant, who was driving the automobile, did not see plaintiff until he was about 25 feet from him. There is some evidence that he sounded his horn and endeavored to stop his automobile but was unable to do so before plaintiff was struck.

Defendant's evidence was also to the effect that plaintiff was struck some 40 feet east of the east side of St. Louis avenue, but for the purpose of this opinion we shall assume that plaintiff's evidence was true, namely, that he left the north sidewalk at Diversey, and walked straight south towards the sidewalk on the east side of St. Louis avenue. There is further evidence indicating that the intersection was well lighted.

Defendant contends that in any view of the evidence taken with all reasonable intendments most favorable to plaintiff, plaintiff was guilty of contributory negligence as a matter of law in crossing the street when he saw defendant's automobile approaching at least one block to the west, at the time he left the north sidewalk, and that the court should have directed a verdict as requested by defendant. We think this contention must be sustained. Ill. Cen. R. R. Co. v. Oswal 338 Ill. 270; Russell v. Richardson, 308 Ill. App. 11; Rajek v. Cummings, 314 Ill. App. 465; Weiner v. Kjelstad, 314 Ill. App. 671; Soic v. Richardson, 315 Ill. App. 213; Prill v. City of Chicago, 317 Ill. App. 202.

In Kelly v. Chicago City Ry. Co., 283 Ill. 640, the court said, (p.645): "As a general proposition, the question of contributory

negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Bale v. Chicago Junction Railway Co. 259 Ill. 476,) but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

The question therefore is, was plaintiff's conduct so violative of all rational standards of conduct under the facts as disclosed by plaintiff's own testimony, that we can say that no rational person would have acted as he did? Assuming that the facts are as plaintiff testified, it was about 1:30 o'clock at night when he reached a point on the north sidewalk of Diversey boulevard directly north of the east side of St. Louis avenue; that he looked to the east and saw no traffic coming from that direction; that he then looked to the west and saw the headlights of defendant's automobile approaching about a block away, which as shown by the undisputed evidence, was about 270 feet west of St.Louis avenue; that he then started south across the roadway of Diversey, which was about 45 feet wide, and walked straight south and did not look towards the west after he left the sidewalk on the north side of the street until just before he was struck by the automobile a short distance south of the center line of the street. We think all reasonable minds would reach the conclusion that he was guilty of negligence as a matter of law under the rule announced in the Kelly case , and that the court should have directed a verdict at the close of the evidence.

In the Russell case (308 Ill. App. 11) Russell was struck and killed by a street car while he was in the act of walking across the street. There was a verdict and judgment in plaintiff's favor which was reversed on the ground that plaintiff was guilty of negligence as a matter of law. The court there said: "A reasonably

[illegible]

prudent man in the same circumstances as disclosed by plaintiff's witnesses would in deference to his own personal safety forego his technical right to cross the street until it was reasonably safe to do so. A man on foot may stop almost instantly upon the appearance of danger while it requires some distance to stop a heavy street car and a reasonably cautious man should take this into consideration in the exercise of due care for his own safety."

In the instant case, as stated, plaintiff, after he left the sidewalk, did not look towards the west although he saw the lights of an automobile approaching from that direction, until he was south of the center line of the roadway of Diversey and but a few feet from the automobile, when it was too late; and the police officers who came up shortly after the accident testified there were no skid marks, and there is no contention that defendant was driving at an excessive rate of speed.

In the Rajck case, 314 Ill. App. 465, Felix Janus was struck and killed while crossing a street car track in front of a southbound Kedzie avenue street car. At the close of plaintiff's evidence there was a directed verdict for defendant and plaintiff appealed. The street car was traveling from 20 to 22 miles an hour. The court said: "There are many cases in this State wherein the courts, under similar circumstances, have held that adults of ordinary prudence are or should be capable of judging whether there is a threat of danger from an approaching street car, and that a reasonably prudent person in the same circumstances, would in deference to his own personal safety forego his technical right to cross the street until it was reasonably safe to do so. Russell v. Richardson, 308 Ill. App. 11." The court held that the evidence showed that the deceased was guilty of negligence as a matter of law and affirmed the judgment.

In the Weiner case (314 Ill. App. 671) plaintiff was struck by an automobile while crossing a street intersection. There was a verdict and judgment in plaintiff's favor for $300 from which plain-

[illegible]

In the [illegible] the [illegible] of an automobile [illegible] of the center line of [illegible] from the automobile, [illegible] who came up [illegible] rates, and there is no [illegible] excessive rate of speed.

In the [illegible] killed while crossing [illegible] Rosie Ferris [illegible] was a directed verdict [illegible] street car are [illegible] said: "There are many [illegible] similar circumstances, [illegible] or should be [illegible] an automobile [illegible] same circumstances [illegible] forego his [illegible] safe to do so. [illegible] held that the [illegible] negligence [illegible]

In the [illegible] an automobile while [illegible] verdict and judgment [illegible]

tiff appealed claiming the damages were inadequate. Defendant contended that plaintiff was guilty of contributory negligence and not entitled to recover at all. The court there said: "we agree with the contention of defendant that the verdict should not be set aside, and that the evidence clearly shows that plaintiff was guilty of contributory negligence which proximately caused the accident. Her testimony is that she was walking south of the crosswalk when she was struck by defendant's automobile. She admits that she did not see the automobile until the impact occurred. *** The evidence clearly shows that the proximate cause of the accident was the fact that plaintiff walked into the side of defendant's automobile, coming in contact with it in the vicinity of the left front door and that she was not in the exercise of due care for her own safety."

In the Soic case (315 Ill. App. 213) plaintiff was struck and injured by a feeder bus while attempting to cross the street in front of the bus. There was a directed verdict for defendants, the court holding that the evidence showed she was not in the exercise of due care for her own safety. In affirming the judgment the Appellate court there said: "The question therefore presented is whether plaintiff produced any evidence of due care for her own safety. The undisputed proof indicates that the feeder bus was not exceeding the lawful speed limit at the time of the accident. It is equally well established by plaintiff's own witnesses that she was struck some distance from the intersection, that she had a clear view of the highway, that there were no vehicles traveling along the highway except the bus. *** and that she crossed in front of the bus without making any visible effort to avoid being struck. Under the circumstances there would be no warrant in law for a finding that she was in the exercise of due care for her own safety."

Counsel for plaintiff cite a number of cases which they contend are in point and that under the law as there laid down, the question of whether plaintiff was in the exercise of due care for his own

safety was for the jury. One of the cases cited is English v. Gordon, 231 Ill. App. 316, but the facts in that case are not analogous to the facts in the case at bar. That accident happened at mid-day when there was no traffic in the street and the evidence showed that immediately after the accident and later on, defendant admitted that he was at fault, and this was not denied. The other cases cited, we think, can also be distinguished on the facts but we feel it is unnecessary to do so.

Holding as we do that plaintiff was not in the exercise of due care for his own safety, no recovery can be had, and the judgment of the Circuit court of Cook county is reversed.

JUDGMENT REVERSED.

Niemeyer, J., and Matchett, J., concur.

safety was for too [illegible]. [illegible] it [illegible] old [illegible] [illegible].

Gordon, 121 111. [illegible], 1918, [illegible] [illegible]

analogous to the [illegible] [illegible]

at mid-day when there was [illegible] [illegible]

showed that in [illegible] [illegible] [illegible]

admitted that he was at fault, [illegible] [illegible]

cases cited, we think, are [illegible] [illegible]

feel it is unnecessary to do so.

Holding as we do that [illegible]

due care for his own safety, we [illegible]

ment of the circuit court of [illegible].

Hieneyer, J., and [illegible], [illegible] concur.

42760

321 I.A. 304

LEO AWOTIN,
Appellant,

v.

MEYER ABRAMS, et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

204269

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Leo Awotin retained Meyer Abrams, an attorney, to represent him in litigation to recover $35,000, face value of bonds purchased by plaintiff from a bank, the bank having entered into a repurchase agreement with Awotin, which agreement it later repudiated. Similar repurchase agreements had been held valid by this court and leave to appeal had been denied by our Supreme court. Later our Supreme court took a case and held such repurchase agreements were void. Knass v. The Madison & Kedzie Tr. & Svgs. Bank, 354 Ill. 554. Afterwards the repurchase agreement entered into by Awotin and the bank, following the holding in the Knass case, was held invalid by this court, Awotin v. Atlas Exchange Nat. Bank, 275 Ill. App. 530, and the judgment of this court was affirmed by the United States Supreme court, Awotin v. Atlas Exchange Bank, 295 U. S. 209. Awotin brought the instant suit against Abrams, his former attorney. The principal charge made in the complaint was that defendant failed to consummate an offer of settlement for $35,000 made by the liquidator of the Bank. The fourthaamended statement of claim filed by Awotin on motion of defendant was stricken, the suit dismissed and he appealed to this court where the judgment was affirmed. Awotin v. Abrams, 309 Ill. App. 421. Prior to the dismissal Abrams had filed his answer and counterclaim, claiming

$3,400 was due him for attorney's fees, but no disposition was made of the counterclaim nor was the fact that such counterclaim had been filed mentioned by counsel in the former appeal. After the judgment of affirmance was entered by this court, counsel for Awotin says the case was redocketed, the counterclaim of Abrams was tried, and a verdict was rendered in favor of Abrams and against Awotin for $2,200. Afterwards Abrams filed a motion for judgment in his favor for $3,400, notwithstanding the verdict of the jury, the motion was allowed, judgment entered in Abram's favor and against Awotin for $3,400, and Awotin appeals.

Many of the facts and the result of a number of suits are mentioned in our opinion, 309 Ill. App. 421, and need not be repeated here.

The record discloses that Awotin had sued the bank on the repurchase agreement and judgment was rendered against him by the Circuit court of Cook county from which he desired to appeal and on June 11, 1931, Awotin and Abrams entered into a written contract whereby Awotin retained Abrams as his attorney to represent him in his claim growing out of Awotin's purchase of $35,000 par value of the bonds from the Atlas Exchange National Bank of Chicago. The contract between the parties, after reciting the purchase of the $35,000 worth of bonds from the bank continues: "and the party of the first part [Awotin] is also desirous, if in the opinion of the party of the second part [Abrams] it will be necessary or advisable, of instituting any other actions in connection therewith." Then follows: "Now, Therefore, It Is Agreed by and between the parties as follows:

"(1) The party of the second part agrees to act as attorney and to do and perform all necessary services in connection with the foregoing appeal to its final determination and to do and perform all other services until all remedies to recover for the party of the first part will be exhausted.

"(2) In consideration of the foregoing the party of the first part

$5,400 was due him for [illegible]
of the counterclaim for [illegible]
filed mentioned by counsel [illegible]
of difference was entered by [illegible]
case was reopened, [illegible]
verdict was rendered [illegible]
afterwards, three filed [illegible]
notwithstanding the verdict [illegible]
judgment entered in favor [illegible]
Austin appeals.

Many of the [illegible]
mentioned in our opinion [illegible]
here.

The second division [illegible]
purchase agreement [illegible]
circuit court of Cook County [illegible]
June 11, 1921, [illegible]
Austin replied [illegible]
growing out of [illegible]
from the Atlas [illegible]
twee the parties, [illegible]
of bonds from his [illegible]
[Austin] is also entitled, [illegible]
second part [illegible]
ting any other [illegible]
Therefore, it is [illegible]

"(1) [illegible]
to do and perform [illegible]
foregoing [illegible]
other services [illegible]
first part will be [illegible]

"(2) In consideration [illegible]

agrees to pay to the party of the second part the sum of $1,000.00 in cash plus an additional sum, making a total up to the amount of 10% from the total amount that will be recovered on said bonds either through the foregoing appeal or through any other suits or actions that may be instituted by the party of the second part on behalf of the party of the first part."

The contract then provides that Awotin is to pay all court expenses, printing of abstracts and briefs, stenographer's fees, etc. After the contract was entered into, Mr. Abrams prosecuted an appeal from a judgment against Awotin and secured a reversal by this court, Awotin v. Atlas Exchange Nat. Bank, 265 Ill. App. 238, and upon retrial a judgment was entered in Awotin's favor against the bank for more than $39,000. Other legal services were rendered by Mr. Abrams during which period of time Abrams claims the parties entered into an oral agreement whereby Awotin agreed to pay him a reasonable fee for such services as he should thereafter render and of which Awotin agreed to pay him $1,000 within a short time but he paid but $100 - that it was found necessary for Mr. Abrams to bring a suit in the United States ~~Circuit~~ District court to enforce Awotin's claim against the bank. Awotin denies that there was such an oral agreement and contends that the written contract of June 11, 1931, required Abrams to perform all the services for which he claims payment in his counterclaim. There was considerable evidence on this phase of the case introduced on the trial, and upon a consideration of the record we are of opinion that the evidence sustains Abrams' contention. And this seems to have been the view of the jury and trial judge.

But we are further of opinion that under the terms of the written contract, Abrams was required to perform all the services he rendered and that this question was not decided by us in the former appeal (as was the contention of Mr. Abrams) and which was

sustained by the trial judge in instructing the jury. There may be some language in the opinion, which if considered alone might sustain the instruction of the trial court, but we think it appears that the basis of our decision was that the allegations were but conclusions and that since the repurchase agreement was held void by our Supreme court in the Knass case, 354 Ill. 554, no recovery could be had by Awotin and Abrams was required to perform no further services. We there said, speaking of the allegations of Awotin's 4th amended complaint: "At any rate, the allegations as to this settlement are mere conclusions which, stripped of verbiage, do not convince. After the decision in the Knass case, we hold there was no further obligation on defendants to render further legal services under the contract as made."

Where a contract is entered into after the relation of client and attorney exists, such a contract is presumptively fraudulent and the burden is on the attorney to show affirmatively the utmost good faith and the absence of undue influence, etc. Elmore v. Johnson, 143 Ill. 513; Miller v. Lloyd, 181 Ill. App. 230. This doctrine has never been departed from by our Appellate or Supreme courts but has often been reiterated. Goranson v. Solomonson, 304 Ill. App. 80; Woods v. 1st Nat. Bank of Chicago, 314 Ill. App. 340.

It must be kept in mind that under the written agreement the fee to be paid Mr. Abrams in excess of $1,000 was contingent upon the amount recovered by Awotin; while under the claimed oral agreement, the amount of attorney's fees to be paid was not subject to any contingency. Moreover, Awotin was to pay Abrams under the oral agreement on account $1,000 within a few days. And when we further consider that when the written contract was made the prospect of recovery was much brighter than when the claimed oral agreement was entered into. In these circumstances we think that

4.

sustained by the total [illegible]
be some language in the [illegible]
sustain the interpretation [illegible]
that the people of our [illegible]
conclusions are that minor [illegible]
our supreme court in the [illegible]
could be [illegible] by [illegible]
services. [illegible]
[illegible] complaint: [illegible]
most [illegible] of [illegible]
after the decision in the [illegible]
obligation or [illegible]
court at [illegible].

More a contract [illegible]
and attorney [illegible]
the burden is on the [illegible]
faith and the [illegible]
148 Ill. 483; [illegible]
has never been [illegible]
has often been [illegible]
Ill. [illegible] v. [illegible]

It must [illegible]
the rule so [illegible]
upon the [illegible]
[illegible]
to any [illegible]
oral [illegible]
further [illegible]
[illegible]
[illegible]

Mr. Abrams did not bring himself within the rule of law above announced.

In the instant case the written contract entered into between the parties June 11, 1931, recites the judgment entered by the Circuit court of Cook county against Awotin when he sought to enforce the repurchase agreement against the bank, and that Awotin "is also desirous, if in the opinion of the party of the second part it will be necessary or advisable, of instituting any other actions in connection therewith." And the agreement further provides that Abrams agrees "to do and perform all necessary services in connection with the foregoing appeal to its final determination and to do and perform all other services until all remedies to recover for the party of the first part will be exhausted." By this agreement Mr. Abrams was required to perform all services until all remedies to recover were exhausted.

For the reasons stated, the oral agreement was without consideration and void.

The judgment of the Superior court of Cook county is reversed but since no recovery can be had, the cause will not be remanded.

JUDGMENT REVERSED.

Niemeyer, J., concurs.
Matchett, J. dissents.

321 I.A. 304

42774

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOHN WILSON,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

An information by leave of court was filed by James Branch charging that defendant, John Wilson, November 29, 1942, "unlawfully, intentionally and maliciously, did, then and there, steal, take and carry away with the intent to steal the same four dollars and fifty cents in lawful money of the United States of America the personal goods and property of the said James Branch."

The record discloses that on the same day, defendant was arraigned, entered a plea of not guilty and waived a jury trial; that he was present in his own proper person; that the Court "after hearing all the testimony of the witnesses" and argument of counsel, found defendant guilty as charged in the information; that the value of the property stolen was $4.50, and defendant was sentenced to be confined in the House of Correction for one year. There is no report of the proweedings in the record so that we do not have before us what took place on the trial.

Defendant contends that the information is substantially defective. The objection seems to be that the information fails to allege the denominations of the money stolen and People v. Hunt, 251 Ill. 446, and cases from other jurisdictions are cited. In the

[illegible]

[illegible] PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

v.

JOHN [illegible],
Plaintiff in Error.

[illegible]

MR. PRINCIPAL JUSTICE [illegible]

An information by leave of court [illegible] charging that defendant, John [illegible], [illegible] "unlawfully, intentionally [illegible], did, [illegible] at al, take and carry away [illegible] to [illegible] dollars and fifty cents in [illegible] America the personal [illegible] of the [illegible].

The record discloses [illegible] arraigned, entered a plea of not [illegible] he was present in his own [illegible] ing all the testimony [illegible] found defendant guilty [illegible] of the property stolen [illegible] confined in the House of [illegible] of the proceedings in the [illegible] as what took place on the trial.

Defendant contends [illegible] defective. The objection [illegible] to allege the denominations of the [illegible] 251 Ill. 446, and cases from other [illegible]

Hunt case, the prosecuting witness testified before the Grand Jury giving the denominations of the money stolen from him. In the indictment, however, it was alleged that the denominations were unknown to the Grand Jury.

In People v. Cohen, 223 Ill. App. 231, we had occasion to consider the Hunt and other cases and said: "In our opinion, an information charging the defendant with the larceny of 'one dollar good and lawful money of the United States of America,' is sufficient and not so indefinite as to make it subject to a motion to quash, nor so insufficient as not to support a finding and judgment of guilty." See also People v. Pitron, #42721, filed December 13, 1943.

A further point is made that the record shows defendant was present in person but was not represented and further that the record fails to show that the trial court advised defendant of his right to a jury trial.

In People v. Chavez #42564, filed October 25, 1943, in considering the same contention which is now before us we said: "Since there is no report of the proceedings in the record, what the court said to defendant as to his right to a jury trial and to be represented by counsel, does not appear. The record simply shows that defendant waived a jury trial. In this state of the record it must be presumed that the waiver of a trial by jury was understandingly made and that the right of defendant to have a trial by jury and to be represented by counsel was fully explained to him by the court." People v. Slade, 319 Ill. App. 114 (abst.).

In People v. Parcoma, 358 Ill. 448, defendant was charged with the offense of carrying a revolver in a motor vehicle with the intent to use it in the commission of a crime. A jury trial was waived, he was found guilty, sentenced to the House of Correction and fined $300. The evidence was not preserved in the record. The court there said: "The court in the trial of criminal cases is bound to see that counsel is provided, when requested, for defendants

Hunt case, the prosecuting [illegible]
jury giving the defendant [illegible]
indictment, however, it [illegible]
unknown to the grand jury.

In _People_ v. _Jones_, [illegible]
consider the _Hunt_ and other [illegible]
motion charging the defendant [illegible]
lawful money of the United [illegible]
not so indefinite as to [illegible]
nor so insufficient as not [illegible]
guilty." See also _People_ v. _[illegible]_, [illegible]

A further point in [illegible]
present in person but was not [illegible]
record fails to show that the [illegible]
right to a jury trial.

In _People_ v. _Beaver_, [illegible]
admit the base counterfeit [illegible]
there is no report of the [illegible]
said to defendant at the [illegible]
sented by counsel, [illegible]
defendant waived a jury trial. [illegible]
pronounced that the [illegible]
made and that the right of [illegible]
be represented by counsel [illegible]
People v. _Wade_, [illegible] (1917).

In _People_ v. _Jackson_, [illegible]
with the crimes of burglary [illegible]
latent to use it in the commission of [illegible]
waived, he was found guilty, sentenced [illegible]
and fined $50. The evidence was not [illegible]
court there said: "The court [illegible]
to see that counsel is provided, when necessary, [illegible]

unable to procure such assistance. It is a matter of common knowledge that in a court such as the municipal court of Chicago hundreds of cases are heard without the intervention of counsel. In the absence of a sufficient showing to the contrary, this court must presume that the judge hearing thiscase in the municipal court did not deny a request for the services of counsel."

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

unable to procure such a [illegible]. It is [illegible] of [illegible] on knowledge that in a court such as the municipal [illegible] of [illegible] hundreds of cases are heard without the intervention of counsel. In the absence of a sufficient showing to the contrary, this court must presume that the judge [illegible] things in the [illegible] court did not deny a request for the services of counsel.

The judgment of the municipal court of Chicago is affirmed.

[illegible] v. Ohio.

Wienerov, J., and [illegible], J., concur.

42803

321 I.A. 305

SYLVESTER J. DOMINO,
Appellant,

v.

NATIONAL CASUALTY CO., a Corporation,
Appellee.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

206 321

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in the Municipal court of Chicago on a policy designated "Hospital Expense Policy" against Defendant to recover hospital expenses incurred by him as a result of an operation for appendicitis. The facts were stipulated, the court found in favor of defendant, judgment was entered accordingly, and plaintiff appeals.

The record discloses that on December 1, 1941, defendant in consideration of a semi-annual premium of $6 paid by plaintiff, issued its policy purporting to insure plaintiff for a period of one year, that is, from the date of the policy tonJanuary 1, 1942, against "loss of life through accidental means, and expense incurred through accident or illness and covers hospital residence, x-rays, operating room fees, anaesthesia and ambulance service, resulting from bodily injuries sustained while this policy is in force, and effected through accidental means ***." Then follow specific provisions in reference to: "Accidental Death Indemnity," "Hospital Expense," "X-Ray Examinations," "Operating Room Fees," "Anaesthesia," "Ambulance Service, "Maternity Expense," and "General Conditions." These are followeddby exceptions, the pertinent part, as conceived by counsel for plaintiff, and which is quoted in the abstract is as follows: "Exceptions,"

42803

SYLVESTER J. DOBSON,
A [illegible],

v.

NATIONAL CASUALTY CO., a
corporation,
A [illegible].

MR. PRESIDING JUSTICE [illegible]

Plaintiff brought an action in [illegible] court of [illegible] on a policy designated "[illegible]" [illegible] to recover hospital expenses incurred by [illegible] operation for appendicitis. The [illegible] found in favor of defendant, [illegible] plaintiff appeals.

The record discloses [illegible] consideration of a semi-[illegible] of [illegible] its policy purporting to [illegible] that is, from the date of the policy to [illegible] "loss of life through accident [illegible] accident or illness and covers [illegible] room fees, anesthesia and ambulance service, [illegible] injuries sustained while [illegible] accidental means ***." Then follow specific provisions [illegible] to: "Accidental Death Indemnity," "Accidental Medical Expense," "[illegible] Examinations," "Operating Room Fees," "[illegible]," "[illegible] "Maternity Expense," and "General Conditions." [illegible] exceptions, the pertinent [illegible] and which is quoted in the [illegible] as follows: "Exceptions,"

"This policy does not cover expenses incurred for sickness or accident ***; or (8) appendectomy, tonsillectomy or operations involving the female generative organs until after the insurance under this policy has been maintained in force for one (1) year; ***." As stated, plaintiff made one semi-annual premium payment at the time the ploicy was issued, December 1, 1941, and another like payment in May, 1942, so that the premium was paid for one year.

Plaintiff's counsel in their brief say: "On July 16, 1942, plaintiff went to a hospital for an appendectomy and was confined there for twelve days. He claims $80.00 and no question is raised as to this amount."

The question for decision is the construction of the policy which in the absence of ambiguity is to be construed the same as any other contract. If the policy is ambiguous, the rule of construction most favorable to the insured will be adopted. Jabara v. Equitable Life Assur. Soc., 280 Ill. App. 147; Capps v. Nat. Union Fire Ins. Co., 318 Ill. 350.

In the instant case we think the provision of the policy involved is clear and unambiguous. It expressly states that the policy does not cover expenses incurred for appendectomy until after the policy has been in force one year. It being conceded that the expenses of $80 sought to be recovered, were incurred in July, 1942, before the policy was in force a year, no recovery can be had.

Since we think the policy was plain and unambiguous we deem it unnecessary to discuss the case of Sommers v. Fidelity Mutual Aid Assn., 84 Mo. App. 605, cited by counsel for defendant.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

"This policy does not cover [illegible] accident *"; or (3) [illegible] voluntary [illegible] involving the female [illegible] this policy has been maintained in force [illegible] As stated, plaintiff made [illegible] time the policy was issued, [illegible] payment in May, 1941, so that the [illegible] one year.

Plaintiff's counsel [illegible] plaintiff went to a hospital for [illegible] there for twelve days. [illegible] as to this amount."

The question for decision [illegible] which in the absence of ambiguity in [illegible] other contract. If the policy is ambiguous, [illegible] most favorable to the insured [illegible] Life Assur. Soc., 260 Ill. [illegible] 2d; [illegible] v. [illegible] 318 Ill. 350.

In the instant case [illegible] involved in clear and unambiguous [illegible] does not cover expenses [illegible] policy has been in force one year. [illegible] expenses of 100 cases [illegible] before the policy was in force [illegible]

Since we think the policy [illegible] it unnecessary to discuss the [illegible] Assur., 24 Ill. App. 609, [illegible]

The judgment of the [illegible] Hemmer, J., and [illegible], concur.

42812

321 I.A. 305

HAZEL FRY,
Appellant,

v.

NORTHWESTERN MUTUAL LIFE INS. CO., FINE ARTS BUILDING,
Appellees.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

207 222

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the Northwestern Mutual Life Ins. Co., and Fine Arts Building, to recover damages for personal injuries claimed to have been sustained by her on account of the negligence of defendants. Defendants denied liability, the facts were stipulated and by agreement the parties submitted the cause to the court.

The record discloses the court "enters the following finding, to-wit: 'The court finds the defendant not guilty.'"

The position of counsel for both parties is that on December 3, 1941, the "defendant" who owned the building at 410 South Michigan Avenue, Chicago, rented "Curtiss Hall" located on the 10th floor of the building for Saturday and Sunday evenings, February 7 and 8, 1942, to an "unincorporated organization of which plaintiff was a member, known as the Chicago Little Theatre Guild, as per contract, photostatic copy of which is hereto attached and made a part hereof." Then follows the photostatic copy of the contract but defendants are not named in the contract at all. It is signed by Illinois Properties, Inc., by C. A. Reiners, and by the Chicago Little Theatre Guild by V. J. Hallstein, President. But for the purpose of this opinion we have assumed it was executed as both parties stipulated. The hall was to be used by the Guild for a

42812

RAZEN ETAL,
Appellant,

v.

NORTHWESTERN MUTUAL LIFE INS. CO., FIRE AND DUPRINGS,
Appellees.

MR. PRESIDING JUSTICE [illegible]

Plaintiff brought an action against the Northwestern Mutual Life Ins. Co., and file [illegible] to recover [illegible] for the injuries claimed to have been caused by [illegible] of the negligence of defendants. Defendants denied liability, [illegible] were stipulated and by agreement the parties [illegible] to the court.

The record discloses the [illegible] to-wit: "The court finds the defendants not guilty."

The motion of counsel for [illegible] 3, 1941, the "defendants" who owned the building, [illegible] Michigan Avenue, Chicago, rented "[illegible]" [illegible] floor of the building for [illegible] and 8, 1942, to an "unincorporated organization of [illegible] was a member, known as the Chicago Little Theatre [illegible] contract, photostatic copy of which is [illegible] part hereof." Then follows the photostatic [illegible] defendants are not named in the contract [illegible] Illinois Properties, Inc., by O. [illegible] Little Theatre Guild by [illegible] purpose of this opinion we have [illegible] parties stipulated. The [illegible] to [illegible] the [illegible]

theatrical production which was to be given by the Guild on the two nights. On the afternoon of February 8, defendants let another concern use the hall and it was turned over to the Guild at 5:30 o'clock and its performance was to begin at 8:30 p.m. The guild was to give a performance of "Allison's House" which it had also given on the previous evening. Certain tapestries and draperies and all equipment and furniture, props and special scenery for the stage were supplied by the Guild except the overhead lights on the stage, the spot lights and the stage curtains, which were fully fireproofed as required by ordinance. That during the performance the Guild used a lighted candle placed on a table on the stage to give atmosphere for the presentation of the scene. After the stage curtain had been closed on the last act, certain draperies used as props in the production by the Guild came in contact with the lighted candle and plaintiff, in attempting to put out the fire was burned, and it is to recover for her injuries that she sues.

In addition to the above facts, the stipulation shows that "The defendant had no prior knowledge that any special electrical lighting equipment was intended to be installed by the Chicago Little Theatre Guild."

Plaintiff's theory of the case, as stated by her counsel, is that "The defendants, owning and operating a theatre to which the public was invited were bound to keep such hall reasonably safe. They permitted use of a candle in close proximity to curtains and draperies which had not been fireproofed as required by the fire prevention" ordinance. "The use of the candle was brought about by reason of the fact that a wall of the 'set' had been dismantled and a grand piano had been placed on the stage by the owners, for a recital and after rebuilding of the wall and removal of the grand piano from the stage no time was left to place the electric lighting equipment and a candle

theatrical productions [illegible]
two nights. On the [illegible]
concerns the wall and [illegible]
o'clock on the afternoons [illegible]
was to give a performance of [illegible]
on the previous evening. [illegible]
equipment and furniture, [illegible]
supplied by the [illegible]
spot lights and the [illegible]
required by ordinance. That [illegible]
lighted candle placed on [illegible]
for the protection of the [illegible]
closed on the last [illegible]
duction by the public [illegible]
plaintiff, in attempting to [illegible]
to recover for her injuries [illegible].

In addition to the above [illegible]
"The defendant had no notice [illegible]
lighting equipment was [illegible]
theatre guild."

In initial [illegible]
that "The defendants, [illegible]
public who invited were [illegible]
permitted use of a [illegible]
which had not been [illegible]
ordinance. "The use of [illegible]
fact that a wall of the [illegible]
been placed on the stage by [illegible]
rebuilding of the wall and removal of [illegible]
no time was left to place the [illegible]

had to be used instead. That negligence of the guild, if any, could not be imputed to the plaintiff."

Upon consideration of the facts as stipulated, we are of opinion that plaintiff's theory of the case, under which she claims defendants are liable, cannot be sustained. Plaintiff was an active member of the Guild, the stage was properly prepared and fireproofed by defendants, they had no knowledge that the candle was to be used by the Guild, and in these circumstances, we think defendants were in no way liable for the unfortunate accident which resulted in injuries to plaintiff.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Niemeyer and Matchett, JJ., concur.

had to be used instead. That is [illegible] could not be imputed to the [illegible].

Upon consideration of the [illegible] opinion that [illegible] defendants are liable, cannot [illegible] member of the guild, the [illegible] by defendants, they had no knowledge [illegible] by the guild, and in these circumstances [illegible] in no way liable for the misfeasance [illegible] injuries to plaintiff.

The judgment of the [illegible]

Mignault and Lafleur, JJ., concur.

42823

321 I.A. 306

NICHOLAS NUDELMAN,
Appellee,

v.

SAMUEL MAYER HAIMOWITZ, also known as SAMUEL HOMAN,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

208 273

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 14, 1941, plaintiff caused judgment by confession to be entered against defendant on a promissory note for $1,125 dated November 29, 1930 and due January 15, 1931, made by defendant and payable to the Foreman State Trust and Savings Bank. The judgment was for the face of the note, interest and attorneys' fees aggregating $2,083.74. Nothing appears to have been done until June 9, 1942, when an execution was issued and a demand made by the sheriff on defendant July 2, 1942. Seven days thereafter, July 9, 1942, defendant filed his petition and moved the court to open the judgment and for leave to defend. An order was entered continuing the matter until September 10, 1942, other orders were entered continuing the matter and on April 7, 1943, defendant filed a supplemental affidavit or petition setting up some facts other than those mentioned in his original petition. May 4, the matter came on to be heard on the petition and supplemental petition or affidavit. The motion was denied, the judgment confirmed and defendant appeals.

The question for decision is whether the petition and supplement set up a meritorious defense and on this record we must assume that the material allegations of the petition and supplement are true.

42825

NICHOLAS NUGENMAN,

Appellee,

v.

SAMUEL MAYER HAIMOWITZ, also known as SAMUEL HOMAN,

Appellant.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT:

January 14, 1941, plaintiff caused judgment by confession to be entered against defendant on a promissory note for $1,125 dated November 29, 1930 and due January 15, 1931, made by defendant and payable to the Foreman State Trust and Savings Bank. The judgment was for the face of the note, interest and attorney's fees aggregating $2,083.74. Nothing appears to have been done until June 9, 1942, when an execution was issued and a demand made by the sheriff on defendant July 2, 1942. Seven days thereafter, July 9, 1942, defendant filed his petition and moved the court to open the judgment and for leave to defend. An order was entered continuing the matter until September 10, 1942, other orders were entered continuing the matter and on April 7, 1943, defendant filed a supplemental affidavit or petition setting up some facts other than those mentioned in his original petition. On 4, the matter came on to be heard on the petition and supplemental petition or affidavit. The motion was denied, the judgment confirmed and defendant appeals.

The question for decision is whether the petition and supplement set up a meritorious defense and on this record we must assume that the material allegations of the petition and supplement are true.

The relation of the parties as appears from the petition and supplement and many of the matters involved were before this court in Nudelman v. Haimowitz, 314 Ill. App. 329 and the judgment of this court was affirmed in 382 Ill. 87. The parties were co-owners of certain premises on which there was a trust deed securing a balance of $45,000. The trust deed and all mortgage papers were owned by the Foreman State Trust and Savings Bank and the parties desired to have the time of payment of the indebtedness extended. Negotiations were taken up with the Foreman Bank and the time of payment extended for a period of five years, and for granting such extension, defendant Haimowitz executed the note in suit payable to the Foreman Bank for their charges or commissions in extending the loan. Afterward the Foreman Bank was taken over by the First National Bank of Chicago and the mortgage papers, including the note in suit, became the property of the First National Bank. After a considerable period of time plaintiff obtained the mortgage papers including the note in suit from the First National Bank of Chicago by paying $12,977.76. When the case above mentioned, 314 Ill. App. 329, was before us we held that Nudelman could recover only one-half of the amount he paid the First National Bank for the mortgage papers. The note in suit was not specifically mentioned but in the case before us it is averred in the petition and supplement that it was purchased as part of the mortgage papers, above mentioned, by plaintiff from the First National Bank. In these circumstances we are clearly of opinion that defendant made out a prima facie defense and the court should have opened up the judgment and given him leave to defend.

The order of the Circuit court of Cook county is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

Niemeyer, J., and Matchett, J., concur.

The relation of the parties as appears from the petition and supplement and many of the matters involved were before this court in Nudelman v. Haimowitz, 314 Ill. App. 320 and the judgment of this court was affirmed in 382 Ill. 87. The parties were co-owners of certain premises on which there was a trust deed securing a balance of $48,000. The trust deed and all mortgage papers were owned by the Foreman State Trust and Savings Bank and the parties desired to have the time of payment of the indebtedness extended. Negotiations were taken up with the Foreman Bank and the time of payment extended for a period of five years, and for granting such extension, defendant Haimowitz executed the note in suit payable to the Foreman Bank for their charges or commissions in extending the loan. Afterward the Foreman Bank was taken over by the First National Bank of Chicago and the mortgage papers, including the note in suit, became the property of the First National Bank. After a considerable period of time plaintiff obtained the mortgage papers including the note in suit from the First National Bank of Chicago by paying $12,377.78. When the case above mentioned, 314 Ill. App. 320, was before us we held that Nudelman could recover only one-half of the amount he paid the First National Bank for the mortgage papers. The note in suit was not specifically mentioned but in the case before us it is covered in the petition and supplement that it was overlooked as part of the mortgage papers, above mentioned, by plaintiff from the First National Bank. In these circumstances we are clearly of opinion that defendant made out a prima facie defense and the court should have opened up the judgment and given him leave to defend.

The order of the Circuit court of Cook county is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

Niemeyer, J., and Matchett, J., concur.

42690

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

EDWARD STURCH,
Plaintiff in Error.

Error to
Criminal Court,
Cook County.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was indicted for the crime of malicious mischief. The indictment alleged that on December 2, 1942, he feloniously, etc., destroyed eight bottles of whiskey of the value of $4.05 each, the property of Tom Gerald, without the consent of the owner. On trial by jury there was a verdict of guilty with a finding of property to the value of $14.50, thus reducing the offense to a misdemeanor. Defendant was sentenced on the verdict to pay a fine of $200 and serve a term of three months in the County Jail.

The acts constituting the alleged crime took place on the morning of December 2, 1942, at 701 North Clark Street in the City of Chicago, in a tavern known as the Royal. Fred Stein was the bartender.

Stein testified that on the morning of December 2, 1942, defendant came in and told him to get hold of Gerald and tell Tom Hill to quit calling up the police department. Stein was behind the bar. There were a couple of ash trays on the bar. The next he knew defendant threw two ash trays, breaking eight bottles and spilling the liquor. Stein says: "He told me to close up the joint and keep it closed." Defendant went out, came back in about an hour and said again to tell Tom Hill not to be calling up the police department. He further said, "I want this place closed, and keep it closed", and

42690

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	
v.	Error to
EDWARD STURCH, Plaintiff in Error.	Criminal Court, Cook County.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was indicted for the crime of malicious mischief. The indictment alleged that on December 2, 1942, he feloniously, etc., destroyed eight bottles of whiskey of the value of $4.05 each, the property of Tom Gerald, without the consent of the owner. On trial by jury there was a verdict of guilty with a finding of property to the value of $14.50, thus reducing the offense to a misdemeanor. Defendant was sentenced on the verdict to pay a fine of $200 and serve a term of three months in the County Jail.

The acts constituting the alleged crime took place on the morning of December 2, 1942, at 701 North Clark Street in the City of Chicago, in a tavern known as the Royal. Fred Stein was the bartender.

Stein testified that on the morning of December 2, 1942, defendant came in and told him to get rid of Gerald and tell Tom Hill to quit calling up the police department. Stein was behind the bar. There were a couple of ash trays on the bar. The next he knew defendant threw two ash trays, breaking eight bottles and spilling the liquor. Stein says: "He told me to close up the joint and keep it closed." Defendant went out, came back in about an hour and said again to tell Tom Hill not to be calling up the police department. He further said, "I want this place closed, and keep it closed", and

walked out. He returned later with a lady and ordered refreshments. About an hour afterwards, Officer Martin, Shannon and Kinsella came in. They had no warrant but struck defendant and took him into custody.

Defendant did not testify. Thevdefense interposed was that defendant was a part owner of the Royal. If he was, he could not be guilty of malicious mischief with respect to property of which he was an owner. The court so instructed the jury.

The testimony in the case centers around three taverns of the same general character operated in this neighborhood, the Diamond (or Diamond Lounge), The Pelican and the Royal. The Diamond was owned by this defendant, Tom Gerald and Tom Hill. These three also owned the Pelican. The Diamond and the Pelican did not prove successful ventures financially and closed. Glickoff the manager testified the Pelican closed November 1, 1942.

When the Pelican closed all the stock in trade was moved to the Royal. Stein, bartender at the Royal, so testified, and Tom Gerald, prosecuting witness, admitted this with some reluctance. First he said the cash register only was taken frombthe Pelican to the Royal; later he admitted an expressman hauled the merchandise from the Pelican to the Royal. The name of this expressman was Ruffalo. He was not called as a witness. The evidence shows that the poorer furniture and equipment at the Royal was moved to the Pelican. This included the piano at the Royal which went to the Pelican, about to be taken over by the creditors, and the better furniture, including the piano, was taken to the Royal. Gerald at last described what happened by saying that when the Pelican closed he took "what he had coming". He said this was stuff he personally owned which was loaned to the Pelican.

walked out. He returned later with a lady and ordered re-refreshments. About an hour afterwards, officer Martin, Gaston and Kinsella came in. They had no warrant but struck defendant and took him into custody.

Defendant did not testify. Thevdefense interposed was that defendant was a part owner of the Royal. If he was, he could not be guilty of malicious mischief with respect to property of which he was an owner. The court so instructed the jury.

The testimony in the case centers around three taverns of the same general character operated in this neighborhood, the Diamond (or Diamond Lounge), The Pelican and the Royal. The Diamond was owned by this defendant, Tom Gerald and Tom Mill. These three also owned the Pelican. The Diamond and the Pelican did not prove successful ventures financially and closed. Gilchrist the manager testified the Pelican closed November 1, 1942.

When the Pelican closed all the stock in trade was moved to the Royal. Stein, bartender at the Royal, so testified, and Tom Gerald, prosecuting witness, admitted this with some reluctance. First he said the cash register only was taken from the Pelican to the Royal; later he admitted an expressman hauled the merchandise from the Pelican to the Royal. The name of this expressman was Buffalo. He was not called as a witness. The evidence shows that the poorer furniture and equipment at the Royal was moved to the Pelican. This included the piano at the Royal which went to the Pelican, about to be taken over by the creditors, and the better furniture, including the piano, was taken to the Royal. Gerald at last described what happened by saying that when the Pelican closed he took "what he had coming". He said this was stuff he personally owned which was loaned to the Pelican.

Defendant put $1250 into the Pelican and the Diamond, apparently $250 of this to Gerald at the Pelican and $1,000 at the Diamond, paid to Tom Hill. The liquor license atvthe Pelican was in the name of Sol Baker, who was a bartender at the Royal. Stein said he did not know whether Gerald had a partner at the Royal. Defendant patronized both places. The evidence shows the name of defendant never appeared on any papers in connection with either of the two places, in which without doubt he had an interest. Gerald described the situation by saying defendant was a "silent partner" in the Diamond and the Pelican. Evidence for defendant tended to show that in the fall of 1939 defendant purchased an interest in the Royal. The lease was purchased from Arthur Calder in the names of Gerald and a man named Lapin, through Marr, who acted as real estate broker. A bill of sale was made out but is not in evidence. Defendant' name did not appear on the paper. Marr says defendant brought Gerald to him and recommended both Lapin and Gerald. He says defendant told him if they did not pay, he would: that defendant had made similar promises to him in connection with other places, and that he relied on his promises. The sale of the Royal included fixtures and good will. The down payment was $1,000. Marr says it was his recollection defendant paid $500 on the deal and guaranteed the payment of $1,500 more. He says he heard Lapin ask defendant to be a partner and the defendant replied "Yes"; that both Lapin and Gerald asked defendant to spend his time there and help in the business. Marr also says that before the deal was closed a man named Heenan came to his office and gave defendant $500, which he put in his pocket. Heenan testified that at the time in question he was in business with defendant and that in connection with the Royal deal he took $500 to Marr's office and gave it to defendant in the presence of Marr. Heenan admitted that in the gambling world he was known as "Frank Chance". There were other witnesses who might have fittingly assumed a like surname. Marr

Defendant put $1250 into the Pelican and the Diamond, apparently $250 of this to Gerald at the Pelican and $1,000 at the Diamond, paid to Tom Hill. The liquor license at the Pelican was in the name of Sol Baker, who was a bartender at the Royal. Stein said he did not know whether Gerald had a partner at the Royal. Defendant patronized both places. The evidence as to the name of defendant never appeared on any papers in connection with either of the two places, in which without doubt he had an interest. Gerald described the situation by saying defendant was a "silent partner" in the Diamond and the Pelican. Evidence for defendant tended to show that in the fall of 1929 defendant purchased an interest in the Royal. The lease was purchased from Arthur Gelder in the names of Gerald and a man named Lapin, through Marr, who acted as real estate broker. A bill of sale was made out but is not in evidence. Defendant name did not appear on the paper. Marr says defendant brought Gerald to him and recommended both Lapin and Gerald. He says defendant told him if they did not pay, he would; that defendant had made similar promises to him in connection with other places, and that he relied on his promises. The sale of the Royal included fixtures and good will. The down payment was $1,000. Marr says it was his recollection defendant paid $500 on the deal and guaranteed the payment of $1,500 more. He says he heard Lapin ask defendant to be a partner and the defendant replied "Yes"; that both Lapin and Gerald asked defendant to spend his time there and help in the business. Marr also says that before the deal was closed a man named Hearman came to his office and gave defendant $500, which he put in his pocket. Hearman testified that at the time in question he was in business with defendant and that in connection with the Royal deal he took $500 to Marr's office and gave it to defendant in the presence of Marr. Hearman admitted that in the gambling world he was known as "Frank Chance". There were other witnesses who might have fittingly assumed a like surname. Marr

said defendant is a handbook operator; that he (Marr) made leases to him, but the leases were always signed by someone else.

Stein said that after the tray incident he called up Gerald and told him what had happened. Gerald says he did not make any complaint to the police; that he and defendant were always friendly and called each other by their given names. Stein says defendant was a good customer and gave tips. Stein says as long as defendant paid fot it he could have broken anything he wanted to. In this case he did not ask him to pay. Gerald says the police called him and asked him to go to the station. He did not know defendant had been arrested. Gerald said he was not "mad" at defendant on account of the breaking of the bottles. He admits that defendant had put $1,000 into one of the other places in which they were interested together and $250 more into the Pelican, where they were likewise interested.

Glickoff manager of the Pelican testifies he heard as many as 10 or 12 conversations in which Gerald, Hill and defendant took part, in which they discussed the business of the Royal and defendant asked for the return of the money he had lost.

The evidence recited above tended to show defendant had an interest in the goods at the Royal; The State was not slow to sense the situation and by way of rebuttal offered two items of evidence received over the objection of defendant tending, as it was argued to the jury, to prove Gerald was sole owner. Gerald was asked on cross-examination whether he had given his consent to have his name endorsed on the indictment as prosecutor, in conformity with Section 7, paragraph 717, Illinois Revised Statutes. His reply was that he did not remember. The State thereupon put the First Assistant State's Attorney on the stand as a witness, and over objection he was allowed to testify that on December 11, 1942, when the case was presented to the Grand Jury, Gerald was present and testified, that the witness

said defendant is a handbook operator; that he (Gerald) made leases to him, but the leases were always signed by persons else.

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asked him whether the property destroyed was his; that he replied "Yes"; if he understood he was named prosecutor in the indictment, and that Gerald said "Yes"; that he was asked if he would testify as a prosecutor at the trial and would carry through the prosecution, and that Gerald said he would.

Also over objection of defendant the State offered and the court permitted to be received in evidence a written agreement dated February 16, 1940, more than two years prior to the incident on which the indictment was based. This paper was signed by Lapin and Gerald. It is in redundant legal phraseology. It purports to be witnessed by one Steiner. Neither Steiner nor Lapin were called as a witnesses. The paper is typewritten, apparently dictated by a lawyer, recites at length that Lapin was transferring all his intetest in the Royal to Gerald, etc. As already stated, this paper on its face was executed more than two years prior to the incident described in the indictment. Defendant's name did not appear on the paper. There was no proof he had ever seen it. Defendant objected to its introduction as pure hearsay.

Defendant earnestly contends the court erred in admitting this paper as well as the oral evidence of the State's Attorney, above recited, and says the judgment should be reversed for these reasons. We hold, however, defendant brought out evidence which made the evidence of the State's Attorney as well as the document dissolving the partnership admissible. The evidence of defendant tended to show that the Royal was purchased in the fall of 1939 by Lapin and Gerald. The indictment charged Gerald was the sole owner at the time of the alleged crime. It was therefore necessary for the State to show that Gerald had become the owner of Lapin's interest. The agreement dissolving the partnership and transferring Lapin's interest to Gerald was therefore admissible. For reasons of the same kind we hold the evidence of the State's Attorney was also admissible. On cross-examination of Gerald, defendant's attorney sought to discredit

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Gerald's Testimony to the effect that he was ~~made~~ the sole owner of the goods destroyed by showing Gerald did not remember whether he had given permission to have his name endorsed on the indictment as a prosecuting witness. In order to disprove this the State's Attorney took the stand to give evidence of the fact that Gerald had given such permission. The evidence was admissible for that purpose although not admissible to prove exclusive ownership of the Royal by Gerald but defendant did not object on that ground. We hold it was no reversible error, such being the facts, to admit this evidence.

It is urged the court erred in denying defendant's motion for a continuance because of a prejudicial article published in a Chicago morning newspaper about the time of the beginning of the trial. People v. Ulrich, 376 Ill. 461, 468, is cited. It does not appear that any of the jurors had read the article complained of or that defendant was injured thereby.

It is also urged that the court erred in refusing to permit the witness Marr to testify to the effect that defendant always paid when he said he would; that he never failed to keep,a promise; that he had always found him to be reliable in his business dealings, etc. We hold it was not error to exclude this evidence.

It is contended that the argument of the State's Attorney was unfair and prejudicial. We find only one objection by defendant on this ground. The State's Attorney called the attention of the jury to the fact that the evidence showed that just after breaking the bottles defendant directed the dice girl and others at the Royal to line up along the wall, which they did; that a customer named Solvay ran out; that defendant ran after him, telling him he would shoot if he did not stop; that a noise was heard outside; that the evidence did not show the nature of the noise butvthe jury had a right to make their own inferences as to what it was from the evidence. Defendant objected to this, and the objection was overruled. We hold there was no error in the ruling.

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Some complaint is made as to the instructions. We find the jury was fully and accurately instructed as to the law applicable to the case. There was only one defense on the merits. This was that Gerald was not the sole owner of the property destroyed but that defendant owned an interest in it. The instructions covered this point.

We have hesitated somewhat in this case to say the State proved Gerald to be the sole owner of the goods destroyed beyond a reasonable doubt. The evidence shows that goods and merchandise from the Pelican, when it closed, were moved to the Royal, but Gerald testified that the only property that he took from the Pelican to the Royal belonged to him personally; that he had loaned it to the Pelican.

The case is unusual in its circumstances. Much of the evidence given by many witnesses was of a kind which the jury had a right to disbelieve. Upon the whole evidence we conclude the question of defendant's guilt was for the jury. The jury and the trial judge saw and heard the witnesses. We hold the verdict approved by the trial judge should prevail. The judgment will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

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AS FRAMED.

O'Connor, P. J., and Bloomfield, J., concur.

321 I.A. 307

42747

NATHAN FINDER,
Appellee,

v.

MORRIS MILLER & CO., INC., a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

July 9, 1942, plaintiff caused judgment by confession to be entered in the Municipal Court of Chicago in his favor against Morris Miller & Co., Inc., for the sum of $2,725.00, with costs. The judgment was entered by virtue of warrants of attorney attached to six promissory notes, each of the date of June 16, 1936, to the order of plaintiff, with interest at 6% and due upon the respective dates named in each of the notes. The notes were each a part of a series of seven notes executed and delivered on the same date. These notes were serial numbers 1 to 7 inclusive. Each of the notes appeared on its face to have been executed by Morris Miller & Co., Inc., by Morris Miller. The principal amount of the notes was $1900; the interest claimed $617.50; attorney's fees, $207.50. These were the items making up the total sum for which judgment was entered.

July 23, thereafter, defendant moved to set aside the judgment, or in the alternative for leave to defend, etc. The motion was supported by the affidavit of the president of the defendant corporation that defendant had a meritorious defense to the whole of plaintiff's claim, in that the warrants of attorney as well as the notes were void because the same were not authorized nor ratified or approved by the corporation. The

42747

NATHAN FINDER, Appellee, v. MORRIS MILLER & CO., INC., a corporation, Appellant.	APPEAL FROM CIRCUIT CT OF COOK CO.

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July 22, thereafter, defendant moved to set aside the judgment, or in the alternative for leave to defend, etc. The motion was supported by the affidavit of the president of the defendant corporation that defendant had a meritorious defense to the whole of plaintiff's claim, in that the warrants of attorney as well as the notes were void because the same were not authorized nor ratified or approved by the corporation. The

judgment was opened, leave given defendant to plead and the corporation filed an amended affidavit setting up also that the execution of the notes and warrants were ultra vires and without consideration. The cause was tried by the court. The court found from the evidence that notes Nos. 2, 3 and 4, aggregating $900.00 (each in the sum of $300.00 and payable 150, 180 and 210 days after date, respectively) were given and accepted for a good and valuable consideration to Morris Miller, personally; namely, moneys paid out and expended on behalf of Morris Miller, personally, in connection with the organization of R. R. Lyons & Company, a corporation; that the defendant corporation did not receive any good or valuable consideration whatsoever therefor; that Miller, who made, executed and delivered these three notes as president of the defendant corporation, was without power or authority to so legally bind the defendant corporation, and that the three notes were therefore null and void as against the corporation. The judgment of the court was that the judgment by confession should be reduced to $1330, for which amount it was confirmed and ordered to stand in full force and effect as the judgment of the court as of the date of rendition. Defendant has appealed from the judgment.

The defendnat contends the court should have made the same finding as to the other notes and we agree with this contention. While under the statute the notes were presumed to have been issued for a valuable consideration to the maker (Ill. State Bar Stats., 1943, Chap. 98, par. 44, §28) whenever evidence was offered tending to overcome this presumption the burden of proof was again cast on plaintiff. Owens v. Nagel, 334 Ill. 96; Wolf v. Peoples Bank, 255 Ill. App. 127. Such evidence was offered here, Mr. Marreck, defendant's accountant, testified defendant, under his direction, kept a complete set of books reflecting the business of the corporation, which were true and correct. These books did not

judgment was opened, leave [illegible] granted to [illegible] corporation filed an answer [illegible] the execution of the notes and [illegible] consideration. The cause [illegible] tried [illegible] from the evidence that [illegible] (each in the sum of $300, [illegible] after date, respectively) were given [illegible] valuable consideration to [illegible] paid out and expended on behalf of [illegible] connection with the organization of [illegible] corporation; that the defendant [illegible] or valuable consideration whatsoever therefor; [illegible] who made, executed and delivered [illegible] defendant corporation, was without [illegible] bind the defendant corporation, [illegible] fore null and void as against the corporation. [illegible] court was that the judgment by confession [illegible] $1330, for which amount it was confessed [illegible] full force and effect as the judgment of [illegible] of rendition. Defendant [illegible] a period [illegible].

The defendant concedes [illegible] finding as to the other notes [illegible]. While under the statute the notes [illegible] for a valuable consideration to [illegible], 1962, Chap. 98, par. [illegible] (3) whenever [illegible] to overcome this presumption the burden [illegible] on plaintiff. Owens v. Wenzel, 324 Ill. [illegible] 255 Ill. App. 127. Such evidence [illegible] defendant's accountant, testified [illegible] kept a complete set of books reflecting the business of the corporation, which were true and correct. [illegible] not

reflect the receipt by defendant corporation of money or any other consideration for the notes sued on. We hold the rule stated in 22 C. J. 169, is applicable:

> "The circumstances that there is no entry, record or memorandum of a fact where it would naturally bevfound if it existed may be relevant."

Marreck testified there was no such entry here. This case is quite distinguishable from Schwarze v. Roessler, 40 Ill. App. 474, and In re Martine, 233 Ill. App. 94, on which plaintiff relies.

Marreck's testimony was corroborated by the ledger received in evidence without objection. This cast on plaintiff the burden of proof to show consideration moving to the defendant corporation and authority of Miller to execute the notes. Plaintiff's own evidence does not meet the situation. On the taking of his deposition prior to the trial and when he testified at the trial, he said he gave Morris Miller a check for $2200, payable to defendant corporation on the date the notes were executed and delivered, and at the trial he said that his attorney had the check. The attorney at once said he did not have it. Plaintiff then said he had confused the situation with a prior transaction between him and the corporation on February 16, 1935. He shifted his position and testified in detail that the notes were given to cover severalnitems, $900 he had advanced for Morris Miller at his request in the organization of the R. R. Lyons Company, also moneys due to him from Morris Miller on account of the sale of a building on Halsted Street. Plaintiff said, "It is a fact that the advance to R. R. Lyons Company of $900 and the money I claim Morris Miller owed me out of this real est te deal aggregated $2200." Thus his own evidence established the fact that the consideration for the seven notes was purely personal to Morris

reflect the receipt by [illegible] consideration [illegible] other consideration for [illegible] stated in 22 O. A. 1[illegible] [illegible]:

> "The circumstances [illegible] or memorandum or [illegible] beyond if it [illegible] by [illegible]."

Barrett testified [illegible] is quite distinguishable [illegible] 474, and In re [illegible] relied.

Barrett's testimony [illegible] in evidence without objection. [illegible] of proof to show consideration [illegible] and authority of Miller to execute the [illegible] evidence does not rebut the allegation. [illegible] deposition prior to the trial [illegible] he said he gave Morris Miller a check for [illegible] defendant corporation on the date the [illegible] delivered, and at the trial he said [illegible] check. The attorney at [illegible] then said he had confused the [illegible] between him and the corporation [illegible] his position and testified in rebuttal [illegible] to cover severalitems, [illegible] his request in the organization of [illegible] money due to him from Morris Miller [illegible] building on Hilgard Street. [illegible] the advance to M. H. Lyons [illegible] Morris Miller owed me out of this [illegible] $2200." Thus his own evidence established [illegible] consideration for the seven notes was [illegible]

Miller and not to the corporation.

In this situation Morris Finder, brother of plaintiff, became a witness for plaintiff, saying he did not have any financial interest in the suit; that he was present when the notes were given; that plaintiff and his brother Peter were there also; that there was a conversation with Morris Miller in which it was pointed out that he owed plaintiff the $900 plaintiff had paid out for Miller to the R.R. Lyons Company, also the transaction in the sale of the Halsted Street property, and that Morris Miller said; "Pete, I will have to give you notes for the total amount"; that the whole sum amounted to $2350, while the notes were for only $2200, but that plaintiff said, "O. K., forget about it". Morris further testifies that another brother of plaintiff (Peter) was present, looked over the notes and called attention to the fact that the notes were signed in the name of the corporation, Morris Miller & Company. He further says that in the course of the conversation Morris Miller said that he had personally paid bills owed by Morris Miller & Company; that Peter said that was O. K. but called attention to the $900, which was a personal transaction, to which Morris answered, "Pete, you know, after all the money I owe you is paid up, all the collateral you have, and all my interest in the R.R. Lyons Company, belongs to Morris Miller & Company anyways," and that Peter then said, "If that is O. K. with you, it is O. K. with me." Then the witness adds, "and Morris said, 'In case the money that I owe the Morris Miller & Company is not--- you know, I don't have enough, I will square it up with the corporation myself."

A motion to strike this evidence was denied by the court. The witness was cross-examined at length and without going into it in detail it bears the stigmatta of manufactured evidence. It is the recital of the oral testimony of a dead man some years after

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his death. Even if this testimony could be reasonably believed Miller, the president of the defendant corporation, would not have any right by such an oral admission to bind the corporate assets for the payment of his personal obligations. Leigh v. American Brake Beam Co., 205 Ill. 147; Culhane v. Swords Co., 281 Ill. App. 185; Warszawa v. White Eagle Brewing Co., 299 Ill. App. 509.

Plaintiff offered in evidence a resolution adopted by the board of directors of the defendant corporation in February, 1935, authorizing the execution of notes of the corporation for money to be borrowed by it from plaintiff. This resolution has no reference to the notes involved in this suit.

The plaintiff argues a ratification of the notes by payment of the first one of the series, and plaintiff states in an affidavit that he was unwilling to produce note No. 1 because it was in the possession of defendant. Note No. 1 by its terms would fall due on October 16, 1936. It was for $300. The check which it is argued was given in payment of this note was not drawn until November 22, 1936. If this check had been given in payment for note No. 1 of this series, it would have included interest at the rate of 6%. The evidence of the bookkeeper shows this check was not given in payment of this note No. 1.

Assuming everything to which plaintiff and his brother testify to be true, Morris Miller would have no right to bind the defendant corporation to pay his own debts. We find as facts that the notes on which this suit is based were executed and delivered by Morris Miller for his own obligations and without any authority from or consideration moving to the defendant corporation. The judgment will therefore be reversed.

REVERSED.

O'Connor, P. J., and Niemeyer, J., concur.

his death. Even if this testimony could [illegible] Miller, the president of the defendant corporation, [illegible] any right by such an oral [illegible] to [illegible] for the payment of his personal obligations. [illegible] Brake Beam Co., 208 Ill. 167; Williams v. [illegible] Co., [illegible] App. 188; Jackson v. [illegible] Co., [illegible] 207.

Plaintiff offered in evidence a [illegible] by the board of directors of the defendant corporation [illegible], 1888, authorizing the execution of notes of the [illegible] for money to be borrowed by it from plaintiff. [illegible] to the notes involved in this suit.

The plaintiff argues [illegible] of the first one of the series, [illegible] that he was unwilling to produce more [illegible] possession of defendant. Note No. 2 [illegible] October 18, 1888. It was for [illegible] was given in payment of this note [illegible] 1888. If this check had been given in [illegible] this series, it would have [illegible] The evidence of the bookkeeper [illegible] in payment of this note No. 1.

Assuming everything to [illegible] testify to be true, Morris Miller [illegible] defendant corporation to [illegible] the notes on which this suit is [illegible] by Morris Miller for his own [illegible] from or consideration moving to the [illegible] judgment will therefore be reversed.

O'Connor, P. J., and Niemeyer, J., concur.

42764

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

GEORGE E. BLAMEUSER,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant, on November 18, 1941 and for years prior thereto and afterwards, was President of the Board of Trustees of the Village of Skokie, in Cook county, formerly known as Niles Center; April 4, 1942 the grand jury of Cook county returned an indictment against him in four counts, charging malfeasance in office; the indictment was brought under section 208 of the Criminal Code (Ill. Rev. Stat. 1943, chap. 38, par. 449, pages 1194-1195); he was arraigned and entered plea of not guilty; on June 2 thereafter, by leave he withdraw his plea and moved to quash the indictment and each count of it; this motion was denied; he then moved for a list of witnesses; this was granted; then for a bill of particulars; this was overruled.

November 16, 1942 the State's Attorney entered a nolle as to the first count; defendant was again arraigned and entered a plea of not guilty and waived trial by jury; the cause was tried by the judge; at the close of the evidence defendant moved for a finding of not guilty; this was overruled; the court then found defendant guilty of wilful and corrupt malfeasance in manner and form as charged in the second count of the indictment; defendant made motions for a new trial and in arrest, and both were denied and judgment entered under a finding under the second count. Defendant was sentenced to pay a fine of $500. To reverse this judgment defendant brings this writ of error.

THE PEOPLE OF [illegible]
IN [illegible]
Defendant in error,

v.

GEORGE E. [illegible],
Plaintiff in error.

[illegible] JUSTICE [illegible] delivered the opinion of the [illegible].

Defendant, on [illegible] 18, [illegible] for [illegible] and afterwards, was [illegible] of the [illegible] of the Village of [illegible], in [illegible] County, formerly [illegible] April 4, 1944 the grand jury [illegible] County [illegible] against him in four counts, [illegible] indictment was brought [illegible] section 2 [illegible] (Ill. Rev. Stat. 1943, ch. [illegible], [illegible] 1-1-18); [illegible] arraigned and entered [illegible] plea of not guilty; [illegible] by leave he withdrew his plea [illegible] moved to [illegible] and each count of it; the motion [illegible] denied; he [illegible] moved for list of witnesses; this motion [illegible]; then [illegible] of [illegible] this was overruled.

November 16, 1942 the [illegible] to the first count; defendant was [illegible] of not guilty and waived trial by jury; the [illegible] judge; at the close of the evidence [illegible] of not guilty; this was overruled; the court [illegible] guilty of willful and corrupt [illegible] in [illegible] charged in the second count of the indictment; defendant's motions for a new trial and in arrest, [illegible] judgment entered under a finding under the second count, and was sentenced to pay a fine of $500. To review [illegible] defendant brings this writ of error.

His first contention is that the court erred in denying his motion to quash the indictment. It seems to be conceded that the conviction under only one of the counts (the second) amounted to an acquittal as to the counts which had not been nolled. People v. Weil, 243 Ill. 208, 212; Thomas v. People, 113 Ill. 531, 535. The first controlling question, therefore, is whether the motion to quash should have been allowed as to the second count. The material averments of that count are that the defendant was President of the Board of Trustees of the village; that it was his duty to take care that the laws of the State and the ordinances of the village were faithfully executed within the village; that on November 18, 1941, instead of performing his duty he unlawfully, wilfully and intentionally was guilty of wilful and corrupt malfeasance in his office in that he intentionally permitted and encouraged open and notorious gambling in the village "by means of handbooks and gambling devices, to-wit: slot machines, and unlawfully, wilfully and intentionally protected various places in said village where said open and notorious gambling by means of handbooks and gambling devices, to-wit slot machines, then and there existed and was in progress in violation off the laws of said State of Illinois, as said George E. Blameuser then and there well knew..."

The second count of the indictment goes on to charge the defendant permitted the keeping, operation and use in rooms, saloons, inns, taverns, sheds, booths, restaurants, stores and enclosures, of slot machines, the same being devices upon which money is staked and hazarded and into which money is paid and played upon chance and upon the result of the respective actions of which slot machines money is staked, bet, hazarded, won and lost, which slot machines were kept operated and used in certain places in the village in violation of the laws of the State, as the defendant well knew, and that he "wilfully and intentionally permitted and encouraged the recording and registering in said village of bets and wagers upon the results of divers horse

In their contention [illegible]
motion to quash the indictment. [illegible]
conviction under only one of [illegible]
[illegible] as to the counts [illegible]
[illegible] 242 Ill. 508, 515; [illegible]
controlling question, therefore, in [illegible]
should have been followed as to the second count.
averments of that count [illegible]
Board of Trustees of the village; [illegible]
that the laws of the [illegible]
faithfully executed within the village; [illegible]
instead of performing his duty [illegible]
ally was guilty of willful and corrupt misconduct in office in that
he intentionally permitted and authorized [illegible]
in the village "by means of [illegible]
slot machines, and unlawfully, illegally and [illegible]
various places in said village [illegible]
gambling by means of [illegible] slot
machines, then and there existing, were in [illegible] violation of
the laws of said State of Illinois, [illegible]
and there well knew...

The second count of the indictment [illegible]
defendant permitted the keeping, construction [illegible]
inns, taverns, shops, booths, [illegible] of
slot machines, the same being [illegible]
hazarded and in a which money [illegible]
the result of the mere motive [illegible]
staked, bet, hazarded, won and lost, [illegible]
operated and used in certain manner [illegible]
laws of the State, as the [illegible]
and intentionally permitted and authorized [illegible]
ing in said village of bets and wagers upon the results of [illegible]

races," all of which was in violation of the laws, as he well knew; that he likewise intentionally permitted and encouraged the keeping in sheds, tenements, etc., in the village, divers books, papers, instruments, devices and apparatus for the purpose of recording and registering bets and wagers upon the resultsbof horse races, which were kept in these places in violation of the law, "as (defendant) then and there well knew..." That he unlawfully, wilfully and intentionally kept and protected from arrest and punishment and from police molestation and interference the keepers of said places in said village "where said open and notorious gambling by means of handbooks and gambling devices existed and was in progress;" that in so permitting, encouraging, etc., these unlawful acts he "was acting in his official capacity" and then and there knew that it "was his official duty ** to stop said open and notorious gambling in said village in violation of law..."

The defendant argues that this count, the substance of which has been recited, amounted to no more than an allegation of nonfeasance and that it did not amount to averments of malfeasance. Defendant relies principally on the case of People v. Flynn, 375 Ill. 366, and says that the count was insufficient because it did not name either the particular persons or describe the particular places in the village where these unlawful acts were carried on. We have examined the opinion in the case of People v. Flynn with some care. The People in that case contended that the indictment was based on section 208 of Division I of the Criminal Code, but the opinion of the court said that there was a special provision applicable, namely sec. 14, art. 2 of the Cities and Villages act. Ill. Rev. Stat. 1939, chap. 24, par. 28. The opinion points out that there was no specific allegation that Flynn knew of the existence of gambling houses and similar places, and that it should have charged that he knew not only of the existence thereof, but where the same were located and that he failed to act. The present case is, we hold, distinguishable in that it is based on

places," all of which was in violation of the law, [illegible] well knew; that he likewise intentionally [illegible] and owners of the premises in sheds, tenements, etc., [illegible] village, [illegible], instruments, devices and [illegible] means of measuring and registering beta and [illegible] upon the [illegible] of beer, which were kept in these places in violation of the law, "a (referred) to and there well knew..." [illegible] and unlawfully, willfully and intentionally kept and protected from arrest and punishment and from police molestation and interference the keeper or [illegible] of said village "where said open and notorious gambling [illegible] and gambling devices existed and [illegible] in no [illegible] in encouraging, etc., these unlawful acts [illegible] in the official capacity" and then and there [illegible] to stop said open and notorious gambling in said village in violation of law..."

The defendant argues that at trial court, the prosecution of which has been recited, [illegible] to more than [illegible] of nonfeasance and that it did not amount to [illegible] of misfeasance. Defendant relies principally on the case of [illegible] v. Flynn, 276 Ill. 360, and says that the court [illegible] it did not make either the particular persons or [illegible] in the village where these unlawful acts were [illegible]. [illegible] the opinion in the case of People v. Flynn [illegible]. [illegible] in that case contended that the indictment [illegible] of Division I of the Criminal [illegible] that there was a special [illegible] of the Cities and Villages act. Ill. Rev. [illegible]

28. The opinion points out [illegible] Flynn knew of the existence of [illegible] that it should have changed that [illegible] evidence thereof, but where the same were [illegible] the [illegible]. The present case is, we hold, distinguishable in that it is based on

a statute which charges wilful and corrupt malfeasance, with knowledge. Section 6 of Division XI of the Criminal Code (Ill. Rev. Stat. 1943, chap. 38, par.716) provides in substance that it shall be sufficient to charge an offense in the terms and language of the statute which creates it, and count 2 of this indictment meets that requirement. Defendant cites quite a number of cases (People v. Chiafreddo, 381 Ill. 214, 218; People v. Glickman, 377 Ill. 360, 366; and People v. Blue, 222 Ill. App. 255, 257) which holds in substance that a charge in the language of a statute will not be sufficient unless the language creating the offense is clear enough that the nature thereof may be easily understodd by the jury. Thus, in People v. Chiafreddo, the Supreme court said: "Notwithstanding the provisions of the above statute, this court has repeatedly held that a charge in an indictment or information, even though in the language of the statute creating the offense, is not sufficiently specific and definite unless the statute, in creating the offense, particularly defines the acts constituting the offense created, so that the charge can be plainly understood." If an indictment informs the defendant and the jury of the nature of the charge so that it can be easily understood, and with the preciseness which would enable the defendant to plead it as a bar to a second prosecution for the same offense, the indictment is sufficient under all the cases. Thus, in People v. Robertson, 284 Ill. 620, after stating this rule, the opinion of the court says further: "An offense affecting life or proper may be private in its nature and the person or the owner of property be so affected by the crime that his name becomes material to a statement of the offense and is an essential element of the charge, but the manifest purpose of the statute in question is the protection of property generally, and the name or names of the owner or owners of property destroyed is not an essential element of the crime." We hold that the offense here, namely that of wilful and corrupt malfeasance in office, is of this nature. Similar cases are People v. Wuesse,

a statute which [illegible]

section 6 of division XI of the [illegible]

ohmp, 38, par.713) [illegible]

to charge an offense in the [illegible]

create it, and court's [illegible]

Defendant cites quite [illegible] People v. Whitson, [illegible]

III. 414, 218; People v. [illegible] [illegible]; [illegible]

Blue, 222 Ill. App. 263, 267) [illegible]

in the language of a statute will not be sufficient [illegible]

language creating the offense is clear enough that the nature

thereof may be easily understood by the jury. [illegible]

Chiaravedo, the [illegible] court [illegible]

of the above statute, [illegible]

in an indictment or information, even [illegible]

statute creating the offense, [illegible]

definite unless the statute, in creating the offense, [illegible]

defines the acts constituting the offense [illegible]

charge can be plainly made clear. [illegible]

defendant and the jury of the nature of [illegible]

easily understood, [illegible]

defendant to plead it [illegible]

offense, the indictment is not [illegible]

People v. Robertson, 264 Ill. 440, [illegible]

opinion of the court [illegible]

may be private in its nature [illegible]

so affected by the [illegible]

of the offense and is [illegible]

manifest purpose of the statute [illegible]

property generally, [illegible]

property destroyed is not [illegible]

that the offense here, namely [illegible]

in office, is of this nature. [illegible] People v. Brown,

310 Ill. 467, Lowell v. People, 229 Ill. 227, and People v. Smith, 239 Ill. 91. We hold this indictment meets the requirements of sec. 9, art. 2 of the Constitution of Illinois, in that it was specific enough to enable the defendant to prepare his defense, and in case of a second charge, to plead this judgment in bar.

It is further contended by defendant that the evidence is insufficient to sustain the conviction, that motions of defendant at the close of all the evidence for an instruction in his favor, for a new trial and in arrest, should have been granted. We hold the evidence is sufficient to sustain the conviction. By stipulation, evidence of 42 tavern and restaurant owners was admitted, each in substance testifying that he had a place of business in Skokie during the year 1941, possessed a slot machine in his place, was never told by the police to take it out and was never arrested by them for possessing such a machine. There was evidence by Jacob L. Smith to the effect that he owned a business at 3500 Church Street in Skokie, that he ran a hand book in the rear, which is stipulated to mean the keeping of a book for registering and taking of bets on the skill of horses and other animals, as described in section 336 of the Illinois Revised Statutes. His testimony is: "*** I have been in the book business for more than 18 months prior to the date of this testimony. ** I am a cousin of the Mayor, meaning the defendant. ** I operated the book with the Mayor's permission." Peter Krier, who operated a tavern at 8014 Lincoln avenue, testified that he had two slot machines in his place of business, that prior to April 1941 he operated a hand book, that he closed after election of April 1941 when the Mayor "told us to close;" that he was never arrested for operating a handbook, "but the local police told us to close about three times in the last three years." Griffin, lieutenant of police for the last seven years in Skokie, testified he visited

310 Ill. 427; Lowell v. People, [illegible] Ill. [illegible]; People v. [illegible], 239 Ill. 91. We hold this indictment meets the requirements of sec. 9, art. 2 of the Constitution of Illinois, in that it was specific enough to enable the defendant to prepare his defense, and in case of a second charge, to plead this judgment in bar.

It is further contended by defendant that the evidence is insufficient to sustain the conviction, that not one of defendant's at the close of all the evidence for an instruction in his favor, for a new trial and in arrest, should have been granted. We hold the evidence is sufficient to sustain the conviction. By stipulation evidence of 42 tavern and restaurant owners was admitted, such in substance testifying that he had a place of business in Joliet during the year 1941, possessed a slot machine in his place, was never told by the police to take it out and was never arrested by them for possessing such a machine. There was evidence by Joseph [illegible] Smith to the effect that he owned a business at 3501 Thorn street in Joliet, that he ran a hand book in the rear, which is stipulated to mean the keeping of a book for registering and taking of bets on the result of horses and other animals, as described in section 366 of the Illinois Revised Statutes. His testimony is: "I have been in the book business for more than 18 months prior to the date of this testimony. ** I am a cousin of the mayor, meaning the defendant. I operated the book with the Mayor's permission." Peter Miller, who operated a tavern at 3014 Lincoln Avenue, testified that he had two slot machines in his place of business, that prior to April 1, 1941 he operated a hand book, that he ceased after election of April 1941 when the mayor "told us to close;" that he was never arrested for operating a handbook, "but the local police told us to close about three times in the last three years." Griffith, Lieutenant of police for the last seven years in Joliet, testified he visited

taverns in Skokie for a period of about 18 months prior to his testimony, had seen slot machines but had never made arrests because he had no orders to; that he visited practically every tavern in Skokie and saw slot machines in quite a few of them; that he did not report to Captain Stolberg or the Chief that he saw them because no one gave instructions to takenthem out; he said it would be a simple matter to keep slot machines out of Skokie if they had orders from the higher-ups to do it. The witness said: "My job is a policeman's job and if the boss wants things stopped, we get orders; if we don't get orders, we lay off. The fact the boss didn't tell us to enforce the law on slot machines was sufficient to indicate we shouldn't make an arrest." Several other police officers gave similar testimony. Stolberg, police captain, testified: "The mayor told me I should not arrest anybody for possession of slot machines."

The State put in evidence a transcript of the testimony of defendant, who testified before the grand jury on March 26, 1942. He said in substance that they had slot machines in the Village of Skokie prior to,1941, in the Spring of 1941;mthat they went out in February, 1941 because of a political angle; "At the time prior to the primary last year a Democratic committeeman had a book for years, and opposed me in every election I ever ran in, and it was a case of cleaning him out, it was not a case of telling one man you could, and the other you could not, so they all had to quit. That was prior to the April primary of 1941, this Democratic chieftain, Scotty Krier, operated his book there ever since he had been in business. From 1933, when I became president of the Village, until April, 1941 he ran a hand book in our town. I never at any time did anything to stop him running. As to why, it is one of those cases of being a good fellow and being too liberal. *** There were other books besides Krier's in my town from 1935 to 1941. **The 3500 Club is my cousin's, named

taverns in Skokie for a period of about 18 months prior to his testimony, had seen slot machines but had never [illegible] because he had no orders to; that he visited practically every tavern in Skokie and saw slot machines in quite a few of them; that he did not report to Captain Stolberg or the Chief that he saw them because no one gave instructions to take them out; he said it would be a simple matter to keep slot machines out of Skokie if they [illegible] from the higher-ups to do it. The witness said: "My job is a policeman's job and if the boss wants things cleaned, we get orders; if we don't get orders, we lay off. The last time the boss didn't tell us to enforce the law on slot machines [illegible] sufficient to indicate we shouldn't make an arrest." Several other police officers [illegible] similar testimony. Stolberg, police [illegible], testified: "The mayor told me I should not arrest anybody for possession of slot machines."

The State put in evidence a [illegible] of the testimony of defendant, who testified before the grand jury on [illegible], [illegible] said in substance that they had slot machines in the village of Skokie prior to 1941, in the [illegible] of [illegible]; that they were in February, 1941 because of [illegible]; "[illegible] the primary last year a Democratic [illegible] and opposed me in every election [illegible] of cleaning him out, it [illegible] of [illegible] and the other you [illegible] to the April primary of 1941, [illegible] operated his book there ever since he been in [illegible] when I became president of the village, [illegible] hand book in our town. I never [illegible] running. As to why, it is one of [illegible] and being too liberal. [illegible] my town from 1935 to 1941. The [illegible]

Smith, I told him if the other fellows could get by, he could too. ** I told that to the Chief of Police. He was told to ignore the fact that Scotty Krier was running a book and Pinocchi and also the 3500 Club. I knew the books were a violation of the law and still I told the Police Department to ignore that violation." It might well be asked, What need is there for further testimony? Numerous citizens of high standing testified to the fine reputation which defendant holds, and their evidence is not contradicted. The whole evidence leaves no doubt in our minds (nor did it leave any in the mind of the trial judge, apparently) that defendant, although much liked by voters of his town, was guilty of wilful malfeasance in office.

The judgment will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

smith. I told him if the other fellow could get by, he could too. ** I told that to the Chief of Police. He was told to ignore the fact that Scotty Kyler was running a book and also the 3500 Club. I knew the books were a violation of the law and still I told the Police Department to ignore that violation." It might well be asked, What need is there for lawful betting? Numerous citizens of high standing testified to the fine reputation which defendant holds, and their evidence is not contradicted. The whole evidence leaves no doubt in our minds (nor did it leave any in the mind of the trial judge, apparently) that defendant, although disliked by voters of his town, was guilty of wilful malfeasance in office.

The judgment will be affirmed.

O'Connor, P. J., and Hemmeter, J., concur.

321 I.A. 308

42792

EMILY NEPIL,
Appellee,

v.

JOSEPH ZEMAN,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On June 13, 1942, at the intersection of Wolf Road and Lake Street in Melrose Park, Cook County, Zeman, driving his automobile (a 1940 Ford Coupe) south, collided with a four-door Dodge sedan, driven by William Waltersdorf in a westerly direction in Lake Street. The collision occurred about noon. Lake Street is a state roa known as route No. 20. The highway at that time was clear and open. A person driving south on Wolf Road had a clear view of any vehicles that might be approaching from the east. Frank Nepil, plaintiff's husband, was sitting in the front seat of the Dodge by the side of the driver. Mrs. Nepil and Mrs. Waltersdorf sat in the rear seat. Plaintiff gave no directions to the driver. The Waltersdorfs and Nepils were friends on their way to Wisconsin for a fishing trip. Waltersdorf says he was driving at a speed of about 35 miles an hour. Two passengers were with Zeman, Miss Margaret Mauricus and Sister Mary Angelus. Defendant had driven the ladies to a hall located at Berkley, Illinois, which they were decorating for a graduation about to take place. Defendant drove first to a florist's at Butterfield and 50th Street; from there to North Avenue and 15th Street, then on North Avenue to Wolf Road and from there south to Lake Street, a distance of about a quarter of a mile. Wolf Road is a two-lane, Lake Street a four-lane highway. North and south of Lake Street were stop

42752

EMILY NEPIL, Appellee,	
v.	APPEAL FROM
JOSEPH ZEMAN, Appellant.	CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT:

On June 13, 1942, at the intersection of Wolf Road and Lake Street in Melrose Park, Cook County, Zeman, driving his automobile (a 1940 Ford Coupe) south, collided with a four-door Dodge sedan, driven by William Walterdorf in a westerly direction in Lake Street. The collision occurred about noon. Lake Street is a state road known as route No. 20. The highway at that time was clear and open. A person driving south on Wolf Road had a clear view of any vehicles that might be approaching from the east. Frank Nepil, plaintiff's husband, was sitting in the front seat of the Dodge by the side of the driver. Mrs. Nepil and Mrs. Walterdorf sat in the rear seat. Plaintiff gave no directions to the driver. The Walterdorfs and Nepils were friends on their way to Wisconsin for a fishing trip. Walterdorf says he was driving at a speed of about 30 miles an hour. Two passengers were with Zeman, Miss Margaret Antiona and Grace Mary Angelus. Defendant had driven the ladies to a hall located at Berkley, Illinois, which they were decorating for a graduation about to take place. Defendant drove first to a florist's at Mannheim and 50th Street, from there to North Avenue and 12th Street, then on North Avenue to Wolf Road and from there south to Lake Street, a distance of about a quarter of a mile. Wolf Road is a two-lane, Lake Street a four-lane highway. North and south of Lake Street were stop

signs. Both roads were inbgood condition. Waltersdorf was driving in the inner lane of Lake Street, going west. On the northeast corner of the intersection was a gas station, about 42 feet from the north edge of Lake Street. Waltersdorf says that he was driving at a speed of about 36 miles an hour. Plaintiff was thrown from the car when the collision occurred and was very badly injured. She became unconscious, was taken to the West Lake Hospital, where she bled from mouth and nose. Her left leg and arm were deformed. X-rays were taken. She was given a narcotic and remained at the hospital until about the morning of August 29, 1942. Dr. Brust, who attended her, describes her injury as "a comminuted fracture of the neck of the left femur, a fractured pelvis in both the ascending and descending parts of the pelvic bone. She had a large friction burn on the left buttock. She had a deep laceration of the left ear. She had a friction burn on her left shoulder, elbow and forearm." The doctor explains that by a "comminuted fracture" he means the bone was broken in more than one place, with a marked deformity. During the eleven weeks she was in the hospital he saw her twice each day. The traction that had been used was removed three or four days before she was permitted to go home by ambulance. She was confined to her home, in bed, for a period of two or more months. During that time she was not able to walk or move around.

Dr. Brust testified and read and translated to the jury the X-ray pictures which had been taken. There was no medical evidence to the contrary and there is no doubt of the severity of the injuries which plaintiff received, which are permanent. It is not argued that th mount of the judgment is excessive.

The complaint charged generally that defendant drove his obile carelessly and negligently, at a dangerous rate of speed, l to stop at thecstop sign and failed to keep a proper lookout hicles on the highway. One paragraph of her compaint was:

signs. Both roads were in good condition. [illegible] was driving in the inner lane of Lake Street, going west. On the northeast corner of the intersection was a gas station, about 4 feet from the north edge of Lake Street. Walterdorf says that he was driving at a speed of about 35 miles an hour. Plaintiff was thrown from the car when the collision occurred and was very badly injured. She became unconscious, was taken to the West L. Hospital, where she bled from mouth and nose. Her left leg and arm were [illegible]. X-rays were taken. She was given a narcotic and remained at the hospital until about the morning of August 20, 1942. Dr. Brust, who attended her, describes her injury as "a comminuted fracture of the neck of the left femur, a fractured pelvis in both the ascending and descending parts of the pelvic bone. She had a large friction burn on the left buttock. She had a deep laceration of the left ear. She had a friction burn on her left shoulder, elbow and forearm." The doctor explains that by a "comminuted fracture" he means the bone was broken in more than one place, with a marked deformity. During the eleven weeks she was in the hospital he saw her twice each day. The traction that had been used was removed three or four days before she was permitted to go home by ambulance. She was confined to her home, in bed, for a period of two or more months. During that time she was not able to walk or move around.

Dr. Brust testified and read and translated to the jury the X-ray pictures which had been taken. There was no medical evidence to the contrary and there is no doubt of the severity of the injuries which plaintiff received, which are permanent. It is not argued that the amount of the judgment is excessive.

A Mo[illegible] complaint charged generally that defendant drove his [illegible] automobile carelessly and negligently, at a dangerous rate of speed, [illegible] Street [illegible]op at the stop sign and failed to keep a proper lookout [illegible] failed for ve[illegible] on the highway. One paragraph of her complaint was:

> "That at the time and place aforesaid defendant disregarding his duty to operate said automobile in a careful and prudent manner, with conscious indifference to surrounding circumstances and conditions and well knowing what the result of his acts might well be, he wilfully, maliciously and wantonly failed to stop for the stop sign and drove, managed and operated the automobile into and against the automobile in which the plaintiff was riding as a passenger", injuring her, etc.

The cause was tried by jury, which returned a verdict for plaintiff in the sum of $10,000. The court at the requestbof plaintiff and without objection so far as the record discloses submitted to the jury this special interrogatory:

> "Do you find the defendant guilty of wilful and wanton conduct, as alleged in the complaint herein, that such conduct, proximately caused the injuries complained of by the plaintiff and that malice id the gist of action?"

The jury replied "Yes". There was a motion for a new trial, which was overruled, and the record recites:

> "It is considered by the court that this action is for a tort committed by the defendant and that malice is the gist of this action and that the plaintiff do have and recover of and from the defendant, Joseph Zeman, her said damages of ten thousand dollars ($10,000.00) in form as aforesaid by the jury assessed, together with her costs and charges in this behalf expended and have execution therefor."

The motion for a new trial was overruled on April 21, 1943, and judgment as above entered. A body execution issued April 26, 1943. On May 13, 1943, defendant made a motion to quash it on the ground that the record was insufficient to support the finding that malice was the gist of the action. The motion was denied and on May 21, 1943, defendant gave notice of appeal from the judgment entered April 16, 1943, and the orders of the court entered on April 21 and May 14, 1943.

It is contended in the first place that the verdict and the

> "That at the time and place aforesaid defendant disregarding his duty to operate said automobile in a careful and prudent manner, with conscious indifference to surrounding circumstances and conditions and well knowing what the result of his acts might well be, he wilfully, maliciously and wantonly failed to stop for the stop sign and drove, managed and operated the automobile into and against the automobile in which the plaintiff was riding as a passenger, injuring her, etc.

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The jury replied "yes". There was a motion for a new trial, which was overruled, and the record recites:

> "It is considered by the court that this action is for a tort committed by the defendant and that malice is the gist of this action and that the plaintiff do have and recover of and from the defendant, Joseph Zeman, her said damages of ten thousand dollars ($10,000.00) in form as aforesaid by the jury assessed, together with her costs and charges in this behalf expended and have execution therefor."

The motion for a new trial was overruled on April 21, 1942, and judgment as above entered. A body execution issued April 30, 1942. On May 13, 1942, defendant made a motion to quash it on the ground that the record was insufficient to support the finding that malice was the gist of the action. The motion was denied and on May 21, 1942, defendant gave notice of appeal from the judgment entered April 20, 1942, and the orders of the court entered on April 21 and May 14, 1942.

It is contended in the first place that the verdict and the

judgment are contrary to the manifest weight of the evidence. We have recited above the principal facts as related by the witnesses for the parties and hold that this contention cannot be sustained. The questions as to whether the plaintiff was in the exercise of due care, the defendant negligent, and whether if so his negligence was of a nature which could properly be found to be wilful and wanton were all questions for the jury.

The evidence for defendant as to the occurrence was given by defendant and Miss Margaret Mauricus, who was riding beside him. Defendant's own testimony is quite contradictory on material facts. At one time he said he first saw the other automobile when his own car was about 5 feet from Lake Street. Again he said he saw the other automobile "a block away before I got in the pavement". When the contradiction in his testimony was called to his attention he said, "You can have them both". The police officer testified that the car in which plaintiff was riding (the Dodge) was struck on its right rear side and was caved in, while the front end of the Ford (defendant's car) was completely smashed. Defendant testified he stopped at the place indicated by the sign before he came to the intersection. Miss Mauricus said he made a "floating stop". Pictures of the automobile are in evidence and from all the evidence the jury might reasonably believe that while in full view of the automobile in which plaintiff was riding, defendant drove his Ford across the intersection at a speed of 45 miles an hour with a reckless disregard of the safety of any travelers on the road approaching from the east.

It is next contended the judgment should be reversed because of the conduct of plaintiff's counsel. Two complaints are made in this respect, one that in the direct examination of William Waltersdorf, the owner and driver of the car in which plaintiff was riding, leading questions were asked and that the same kind of questions were asked of Dr. Brust. Defendant, however, fails to point out that any of these

judgment are contrary to the manifest weight of the evidence. We have recited above the principal facts as related by the witnesses for the parties and hold that this contention cannot be sustained. The questions as to whether the plaintiff was in the exercise of due care, the defendant negligent, and whether if so his negligence was of a nature which could properly be found to be wilful and wanton were all questions for the jury.

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It is next contended the judgment should be reversed because of the conduct of plaintiff's counsel. No complaint was made in this respect, one that in the direct examination of William Lindsay, the owner and driver of the car in which plaintiff was riding, leading questions were asked and that the same kind of questions were asked of Dr. Street. Defendant, however, fails to point out that any of these

questions were objected to and no case is cited indicating that on such a record a judgment will be reversed for that reason. It is also contended that plaintiff's counsel misled the jury by referring to defendant as "a retired man", thus giving the jury the impression that he was wealthy. We have read the evidence and do not think there is any basis for this and other criticisms made in this respect.

Defendant says plaintiff did not prove the allegation of her complaint that she was in the exercise of due care and other material allegations. He cites Walker v. Ill. Commercial Tel Co., 315 Ill. App. 553, 559; Melonascino v. Superior Felt & Bedding Co., 313 Ill. App. 557, 570, and Carson Pirie Scott & Co. v. Chicago Rys. Co., 309 Ill. 346, 352. He says plaintiff testified she did notc see defendant's automobile before the accident; that the only reason she gave for not seeing it was that she was just looking at the driver. The other occupants of the automobile in which she was riding, he says, testified they saw defendant's car. Plaintiff was sitting in the back seat. Just how plaintiff's failure to see defendant's automobile before the accident contributed tonthe collision defendant does not suggest. Contributory negligence must contribute if it is to bar recovery. Wintersteen v. Nat. Cooperage Co., 361 Ill. 95; Petro v. Hines, 299 Ill. 236; Pollard v. Broadway Cent. Hotel Corp., 353 Ill. 312.

Defendant says the complaint charged eight negligent, careless or unlawful acts, enumerated from (a) ton (g), and that one of these charged wilful and wanton conduct. It is said this should have been charged in a separate count. Defendant cites Grubb v. Milan, 249 Ill. 456. Rule 12 of the Supreme Court says:

> "Different breaches of a contract, bond or other obligation, and different breaches of duty, whether statutory or at common law, or both, growing out of the same transaction, or based on the same set of facts may be treated as a single claim or cause of action, and set up in the same count."

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Defendant says the complaint charged eight negligent carelessness or unlawful acts, enumerated from (a) to (g), and that one of these charged wilful and wanton conduct. It is said this should have been charged in a separate count. Defendant cites Grubb v. Milan, 249 Ill. 456. Rule 12 of the Supreme Court says:

> "Different grounds of a contract, bond or other obligation, and different grounds of duty, whether statutory or at common law, or both, growing out of the same transaction, or based on the same set of facts may be treated as a single claim or cause of action, and set up in the same count."

Grubb v. Milan was decided prior to the enactment of the Civil Practice Act. It was not necessary for plaintiff to set up the alleged wilful and wanton conduct in a separate and distinct count. Heneghan v. Goldberg, 296 Ill. App. 253.

Defendant's objection that the conduct of counsel was improper and to the giving of the special interrogatory to the jury are raised for the first time in this court. There was no objection made in the trial court to the giving of the interrogatory. There was no motion to set aside the answer of the jury given thereto. There was no objection made with reference to the conduct of counsel in defendant's motion for a new trial. Neither of these matters was mentioned or complained of. These alleged errors, therefore, cannot prevail on this record in this court. Rubottom v. Crane, 302 Ill. App. 58; Voigt v. Anglo-American Provision Co., 202 Ill. 462; Budek v. Chicago, 279 Ill. App. 410; Brant v. Chicago & Alton R.R. Co., 294 Ill. 606; Brimie v. Belden Mfg. Co., 287 Ill. 11.

Defendant also complains generally of the instructions. This point also seems to have been raised for the first time in this court. The practice in this respect is controlled by Section 67 of the Practice Act (Smith-Hurd Ill. Anno. Stat., 1943, Chap. 110, par. 191.) Formal exceptions are not necessary. Dept. of Public Works and Buildings v. Barton, 371 Ill. 11, 19 N. E. (2d) 935. See also People v. Upson, 338 Ill. 145, and Miller v. Anderson, 269 Ill. 608. The section does not seem to prescribe precisely just when or how objections to instructions are to be made in the trial court, but it seems only reasonable to hold that such objection should at least be set up in the motion for a new trial. This was not done here nor indeed does the defendant in this court set up precise objections to particular instructions.

Finally, defendant contends the motion to quash the writ of capias ad respondendum should have been granted. He says the complaint contains no prayer for a capias writ; that the interrogatory was

Grubb v. Kilian was decided prior to the enactment of the Civil Practice Act. It was not necessary for plaintiff to set up the alleged willful and wanton conduct in a separate and distinct count. Henegham v. Goldberg, 298 Ill. App. 503.

Defendant's objection that the conduct of counsel was improper and to the giving of the special interrogatory to the jury are raised for the first time in this court. There was no objection made in the trial court to the giving of the interrogatory. There was no motion to set aside the answer of the jury given thereto. There was no objection made with reference to the conduct of counsel in defendant's motion for a new trial. Neither of these matters was mentioned or complained of. These alleged errors, therefore, cannot prevail on this record in this court. Rubotom v. Grace, 302 Ill. App. 38; Voigt v. Anglo-American Provision Co., 302 Ill. 486; Sugek v. Chicago, 279 Ill. App. 410; Brent v. Chicago & Alton R.R. Co., 254 Ill. 508; Brimie v. Belden Mfg. Co., 267 Ill. 11.

Defendant also complains generally of the instructions. This point also seems to have been raised for the first time in this court. The practice in this respect is controlled by section 67 of the Practice Act (Smith-Hurd Ill. Anno. Stat., 1942, Chap. 110, par. 111. Formal exceptions are not necessary. Dept. of Public Works and Buildings v. Barton, 371 Ill. 11, 19 N. E. (2d) 38. See also Peoples v Upson, 338 Ill. 145, and Miller v. Anderson, 380 Ill. 609. The section does not seem to prescribe precisely just when or how objections to instructions are to be made in the trial court, but it seems only reasonable to hold that such objection should at least be set up in the motion for a new trial. This was not done here nor raised over the defendant in this court set up precise objections to particular instructions.

Finally, defendant contends the motion to quash the abstract of cause and respondentum should have been granted. We says the complaint contains no prayer for a capias writ; that the interrogatory was

objectionable in that it asked three questions in one, and cites Dunwoody & Co. v. Washington, 315 Ill. App. 54; Racine Fuel Co. v. Rawlings, 377 Ill. 375; L. Wolf Manf. Co. v. Wilson, 152 Ill. 9, 17; Gronlund v. Forsman, 124 Ill. App. 362, 367: Ingalls v. Allen, 43 Ill. App. 624, 625; Ingalls v. Raklios, 373 Ill. 404, 408; Pfeifer v. French, 376 Ill. 376, 379. We have examined the cases cited but do not find them persuasive for reasons stated. The case of Ingalls v. Raklios seems to be the final word on such motions to quash. It is there said:

> "The statement in the judgment that the court makes a special finding of malice is not the equivalent of the finding that malice was the gist of the action upon which judgment was entered."

Here, the finding of the jury and the statement in the judgment are both to the effect "that malice is the gist of this action." We hold the court did not err in denying the motion to quash this writ. The judgments will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

objectionable in that it asked three questions in one, and other Dunwoody & Co. v. Washington, 318 Ill. 399, 94; Illinois Steel Co. v. Hawkins, 277 Ill. 375; L. York Sand Co. v. Allison, 18 Ill. , 17; Gronlund v. Foreman, 124 Ill. App. 385, 387; Ingalls v. Allen, 43 Ill. App. 624, 628; Ingalls v. Mallios, 276 Ill. 404, 408; Pfeifer v. Fremon, 278 Ill. 370, 372. We have examined the cases cited but do not find them persuasive for various stated. The case of Ingalls v. Mallios seems to be the final word on such motions to quash. It is there said:

> "The statement in the judgment that the court makes a special finding of malice is not the equivalent of the finding that malice was the gist of the action upon which judgment was entered."

Here, the finding of the jury and the statements in the judgment are both to the effect "that malice is the gist of this action." We hold the court did not err in denying the motion to quash this writ. The judgments will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

(42800
42825 Consolidated.

PATRICK D. CASEY, FLORENCE SCHAEFFER and R. W. GREENE,
Appellees,

v.

WALTER J. McGUIRE and VERNON M. WELSH, as Stock Trustees Under Voting Trust Agreement relating to Capital Stock of the Drexwood Building Corporation, and as Directors of the Drexwood Building Corporation,
Appellees,

ERNESTINE KAHN,
Appellee,

M. H. CASE Appellant

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

A

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MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

These appeals by M. H. Case bring before us for review an order of May 3, 1943, and a decree of May 18, 1943, both by the Circuit Court. The controversy arises out of the proposed sale of real estate located at the southwest corner of 44th Street and Drexel Boulevard in the City of Chicago, and known as the Bradford Hotel. It is a three story and English basement structure of forty-six apartments. The title and control of the premises are in trustees under a liquidation trust agreement made February 15, 1937. Under the trust plan the title of the real estate is in the Drexwood Building Corporation. The trustees of the trust hold all the stock in and act as directors of the corporation in conformity with the provisions of the trust. The trust is for the benefit of former bondholders who now hold certificates or units of interest therein. The trustees of the trust and directors of the corporation are defendants, Walter J. McGuire and Vernon M. Welsh. The plaintiffs are Casey, Schaeffer and Greene, who hold certificates or units of

42800 consolidated.
42829

PATRICK D. [illegible], Plaintiff [illegible]
and R. W. [illegible],

Appellees,

v.

WALTER J. [illegible] Vice-President [illegible],
as Stock Trustees under Voting Trust
Agreement relating to Capital Stock of
the Brewood Building Corporation, [illegible]
as Directors of the Brewood Building
Corporation,

Appellees,

INVESTING [illegible],

Appellee,

L. H. DAGE

Appellant.

MR. JUSTICE [illegible] DELIVERED THE OPINION [illegible].

These appeals by [illegible] from orders [illegible] to review an order of May 6, 1942, and a decree of [illegible], 1943, both by the Circuit Court. The controversy arises out of the proposed sale of real estate located at the northwest corner of [illegible] and Drexel Boulevard in the City of Chicago, [illegible] Hotel. It is a three story and [illegible] six apartments. The title and control of the property [illegible] trustees under a declaration [illegible] 1927. Under the trust plan the title of [illegible] Brewood Building Corporation. [illegible] the stock in and act as directors of the corporation [illegible] with the provisions of the trust. [illegible] former boardholders who now hold [illegible] therein. The trustees of the trust [illegible] are defendants, Walter J. Hoehne and [illegible] M. [illegible] are Dacey, Schaeffer and [illegible], who [illegible]

interest in the trust, as also does Ernestine Kahn, who is an intervening petitioner.

On April 7, 1943, plaintiffs filed their bill seeking an injunction against the acceptance by the trustees of an offer by Case made about March 3, 1943, of $53,500 for these premises. The premises constitute the entire assets of the trust. Plaintiffs and the intervening petitioner prayed an injunction against the proposed sale and other relief. The offer of Case contained a provision to the effect that if any other bidder made a higher offer, Mrs. Case should have the privilege of meeting it within 10 days, and in case she did not meet it no further bids would be received. Morris Shapiro on April 6, 1943, made an offer of $57,500, which he afterwards increased to $60,000.

The trustees answered the bill of complaint, which was afterwards amended by a supplemental bill which set up the higher bids of Shapiro. They denied any wrongful actions or improper purpose in submitting the offer to the stockholders and holders of certificates and they asked the advice of the court, agreeing to abide by whatever directions should be given them by the court. The sworn answer of the trustees said "that no sale of the said Drexwood Building property will be made until a full and complete hearing has been had on this proceeding and that these respondents will abide by any order or decree entered herein by this court."

On May 3, 1943, all the parties appeared before the court. The trustees made a statement as to the facts, about which there is apparently no dispute on any material matter. All the parties of record were present, and the court after hearing them entered an order of that date to the effect, first, that it had jurisdiction of the parties and subject matter; second, "that a sale of the property involved be held in open court on Monday, May 10, 1943 at 10:30 A. M.

interest in the trust, [illegible]

intervening petitioner.

On April 7, 1944, [illegible]

injunction against the [illegible]

case made about [illegible]

premises conveyed to the [illegible] trust. [illegible]

the intervening petitioner [illegible]

sale and other relief. [illegible]

the effect that it [illegible]

should have the validity of [illegible]

she did not meet it [illegible]

Shapiro on April 6, 1944, [illegible]

wards increased to [illegible]

The trustees [illegible]

wards secured by a [illegible]

of Shapiro. They [illegible] purchase

in substituting the [illegible]

and they asked the [illegible]

directions should [illegible]

the trustees and [illegible]

property will be [illegible]

on this proceeding [illegible]

or decree entered herein by this court.

On May 5, 1944, [illegible]

trustees made a [illegible]

apparently to disapprove on [illegible]

record were present, [illegible]

of that date to the effect, [illegible]

parties and indicate matter; second, [illegible]

involved be held in open court or [illegible]

in the forenoon, without further notice, at which time the property shall be offered for sale"; and third, "All parties shall have the right to offer evidence for the record at said time."

Mrs. Case did not avail herself of the opportunity to offer any evidence. On May 7, 1943, she gave notice of appeal from this order. She caused the record to be filed in this court in due time, but she made no motion for a supersedeas. When the time for taking bids arrived without any offer of evidence she raised the point that the court was without jurisdiction because of the appeal she had taken to this court. This objection was overruled. Bids were received. Morris R. DeWoskin bid for the property $72,500 in cash, which was the highest bid received. The cause was then continued from time to time until May 18th, when the court entered a decree to the effect that all answers and intervening petitions and complaints on file should stand as answers to the intervening petition of Case; that the court had jurisdiction of the parties and subject matter; that the premises (describing them) were held in trust under the agreement of February 16, 1937, etc.; recited the offer of Case of March 3, 1943; that notice thereof was sent by registered mail to the holders of the certificates evidencing stock trust units; that written objections had been filed by certificate holders about April 6, 1943, to the proposed sale; that holders of 410 stock trust units protested the sale; that one-third of the outstanding trust units were slightly in excess of 442 units; that on April 7, 1943, Morris Shapiro had made a bid of $57,500 and was prepared to bid more; that the certificate holders had moved for an injunction against the sale; that on April 19, 1943, an offer for the property of $60,000 was made with a certified check for $4,200; that the trustees returned the check refusing to consider the offer; that the alleged offer contained a request to permit the bidder to increase his bid in the event the same was met by any other offeror; that defendants, by answers and representations made

in the forenoon, without [illegible] the claimant
should be offered for [illegible]
right to offer evidence [illegible]

Mrs. Cane did not [illegible] to offer
any evidence. On May 1, [illegible]
order. She claimed that [illegible] time,
but she made no motion for [illegible] time for taking
bids arrived without any [illegible] the point that
the court was without jurisdiction [illegible]
taken to this court. [illegible] receive
Morris R. Brookin bid [illegible] was the
highest bid received. The [illegible] to
time until May 18th, [illegible] offer the
all answers and information [illegible]
stand as answers to the [illegible]
had jurisdiction of the [illegible] premises
(describing them) were [illegible] February 1
1927, etc.; recited the [illegible] notice
thereof was sent by [illegible]
evidencing stock issued [illegible]
by certificate [illegible]
that holders of 410 [illegible]
third of the outstanding [illegible]
units; that on April 1, [illegible]
$27,500 and the [illegible]
had moved for an injunction [illegible]
an offer for the property [illegible]
for $4,500; that [illegible]
the offer; that the [illegible]
bidders to increase his bid [illegible]
other officers; that [illegible]

in open court, had admitted these allegations; that pursuant to the offer made by Case, notice of the higher offer was served upon her; that subsequent to the filing of the complaint and prior to the meeting of the shareholders held ~~xxxx~~ on that day Case notified defendants that her original offer of $53,500 was increased to $58,000; that Shapiro, in the offer of April 6, 1943, requested that in the event his offer of $57,500 was met by Case, he be given an opportunity of increasing it; that the building corporation on April 7th notified Shapiro that the offer of Case had reserved the right to meet higher offers made on or prior to the time of the shareholders meeting and, therefore, his request for an opportunity to increase his first offer could not be granted, and that a meeting of the corporation would be held on Tuesday, April 13, 1943, when all offers would be considered.

The decree also finds that on April 19, 1943, Shapiro gave notice of an increased offer of $60,000 and accompanied the same with a check; that defendants, as holders of all the shares of stock as voting trustees, at the meeting of April 13th authorized the approval and acceptance of the offer of Case for $58,000 and notified Case on April 16th that her amended offer was accepted, subject, however, to the action of the court.

The decree finds that the original bid of Case was grossly inadequate, several persons having offered to pay a sum in excess of $58,000 and in view of this and the upward trend of the real estate market it was to the best interests of the holders of the stock trust units that the property should be sold in open court; that pursuant to the order entered on May 3, 1943, (no proofs or evidence having been offered by any objectors) the property was offered for sale, beginning at the price of $60,000; that the bid of Morris R. DeWoskin of $72,500 was the best bid. It was, therefore, ordered and decreed that the sale be made to DeWoskin; that the

in open court, had sent to the [illegible] in answer to the offer made by [illegible] notice of the [illegible]; that subsequent to the filing of the [illegible] meeting of the shareholders held [illegible] defendants that her original offer of [illegible] $88,000; that thereupon, in the offer of [illegible] in the event his offer of [illegible] opportunity of increasing it; [illegible] 7th notified Shapiro that the [illegible] to meet higher offers made on or before [illegible] meeting and, therefore, his request for [illegible] his first offer could not be [illegible] corporation would be held on [illegible] would be considered.

The decree also finds that [illegible] notice of an increased offer [illegible] with a check; that defendants [illegible] stock as voting trustees, at the meeting [illegible] the approval and acceptance of the offer [illegible] notified Case on April 13th that her [illegible] subject, however, to the action of [illegible].

The decree finds [illegible] inadequate, several persons [illegible] of $88,000 and in view of [illegible] estate market it was to the best interests [illegible] stock that units that the necessary [illegible]; that pursuant to the order entered on [illegible] evidence having been offered by any objectors [illegible] offered for sale, beginning at the price of $88,000; that the [illegible] of Morris R. Bowskin of [illegible] ordered and decreed that [illegible] the

building corporation be instructed to cancel the acceptance of the amended offer of Case, to return her earnest money deposit and to consummate the sale to DeWoskin, the court reserving jurisdiction to consider and pass upon further acts and doings. From this decree Case has perfected her second appeal.

All of the parties to this cause except Case are satisfied with the decree and urge its affirmance for obvious reasons. It was the clear duty of the trustees to get the best price obtainable on the sale of the entire trust property. Mrs. Case contends that the burden of proof in the first instance was on the plaintiffs and intervening petitioner, an elementary rule of law, which is not challenged. She urges that an adjudication on the merits should follow after and not precede the evidence, also an elementary rule which she had the opportunity of following had she wished to do so. She urges that a court of equity will not interfere with the discretionary action of trustees in the absence of proof that they acted unreasonably or in bad faith, also an elementary rule. Her complaint in this regard overlooks the uncontradicted fact that the trustees submitted the question of their actions to the court and that they approve of the decree and urge its affirmance here. She urges that in the absence of proof the trustees act unreasonably or in bad faith, trustees may in their discretion choose the method of sale of trust property, whether by private negotiation or by public auction, another proposition not disputed by any of the parties. She urges that the provision in her offer that she have ten days within which to elect to meet the highest of any other offers received was also fair and equitable, a matter wholly immaterial here, as we see it. She urges that a court of equity will not set aside a contract of sale fairly entered into by trustees in order to give a disappointed bidder a second opportunity to bid, which also may be conceded without affecting the results of this appeal.

building corporation in another [illegible] of the amended offer of [illegible], to [illegible] and to consummate the sale to [illegible], [illegible] to consider and pass upon further [illegible]. [illegible] Case has perfected her [illegible].

All of the parties to this [illegible] the doores and urge its [illegible] closer duty of the trustees to [illegible] sale of the entire trust property. [illegible] burden of proof in this first [illegible] intervening petitioner, an elementary [illegible], which is not challenged. The urges that an [illegible] follow after and not precede the [illegible] which she had the opportunity [illegible] co. She urges that a court of equity will not [illegible] exchequer action of trustees in the [illegible] that they acted unreasonably or in bad faith. [illegible] complaint in this regard [illegible] threatens submitting the question [illegible] that they approve of the course [illegible] urges that in the absence of [illegible] or in bad faith, trustees [illegible] of sale of trust property, [illegible] public auction, another proposal [illegible] parties. She urges that the [illegible] ten days within which to give [illegible] offers received was also [illegible] here, as we see it. She urges that [illegible] made a contract of sale [illegible] give a disappointed bidder a second opportunity to bid, which also may be conceded without affecting the results of this appeal.

The uncontradicted facts here show that the corporation accepted the bid of Mrs. Case subject to the action of the trial court, where this suit was pending. She did not, therefore, at any time have a valid and existing contract for the purchase of this property for $58,000, and the trustees would have been remiss in their duties to the certificate holders if they had sold this property to her for $14,500 less than another purchaser was ready to pay. From the standpoint of right and justice, there is no merit to her appeal at all. Notwithstanding the plain inequity and unfairness of her position, she makes bold to argue that the trial court was without jurisdiction to take the bids and approve the sale because of a supposed appeal taken on May 7th from the order entered on May 3, 1943. She says this appeal had the effect of depriving the trial court of jurisdiction to enter further orders in the cause. She cites Union Central Life Ins. Co. v. Anderson, 291 Ill. App. 423; Parish Bank & Trust Co. v. Uptown Sales and Service Co., Inc., 300 Ill. App. 73, with other cases. There are two reasons why her appeal did not have that effect. In the first place, the order of May3rd was only interlocutory. It did not finally dispose of the issues in the cause. She could not deprive the trial court of jurisdiction of the cause by taking a supposed appeal from an order which was not final in its nature. Such an appeal is a mere nullity. Wright v. Risser, 378 Ill.72. (See Ill. Rev. Stat. Chap. 110, par. 206, §82). In the second place, she neither made a motion for nor obtained a supersedeas in this court. An appeal without a supersedeas does not suspend the operation of the order or judgment appealed from. Dilks v. Board of Education, 283 Ill. App. 378. The appeal, therefore, from the order of May 3, 1943, will be dismissed, and the decree of May 18, 1943, will be affirmed.

APPEAL FROM ORDER OF MAY 3, 1943,
DISMISSED; DECREE OF MAY 18, 1943,
AFFIRMED.

O'Connor, P.J., and Niemeyer, J., concur.

The uncontradicted facts have [illegible] accepted the aid of [illegible]. [illegible] court, where this suit was pending. [illegible] any time have a valid and [illegible] this property for $[illegible], and the [illegible] in their duties to the [illegible] property to her for $[illegible] to pay. From the standpoint of [illegible] merit to her appeal at all. [illegible] weakness of her position, [illegible] court was without jurisdiction to [illegible] able because of a supposed [illegible] entered on May 5, [illegible]. [illegible] depriving the trial court of jurisdiction [illegible] in the case. The order [illegible] 291 Ill. App. 425; [illegible] Service Co., Inc., 301 Ill. App. [illegible]. [illegible] two reasons why her appeal did not [illegible] place, the order of [illegible] disposes of the issues in the case. [illegible] court of jurisdiction of the case [illegible] an order which was not final in the [illegible] mere nullity. [illegible] v. [illegible] 110, par. 80c, [illegible]. In the second [illegible] motion for nor obtained a [illegible] without a supersedeas does not suspend the [illegible] or judgment appealed from. [illegible] 378. The appeal, therefore, from the [illegible] dismissed, and the decree of May 15, [illegible].

[illegible]

42697

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOSEPH HOREJS, HERBERT UTZ, JOSEPH CHLUSTINA, OTTO SCHALK, et al., Appellees,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
GEORGE STEDRONSKY, President, EDWARD GRISKO, GUSTAVE RANDA, JOSEPH DANEK, RUDOLPH J. KREJCI, Trustees, and as members of the Board of Trustees of the Town of Cicero, ANTON J. KRUPICKA, Clerk, JERRY J. VITERNA, Collector, LEO KASPERSKI, Supervisor, and FRANK J. CHRISTENSON, Assessor, Town of Cicero, Illinois, Appellants.	

4

980

215

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order directing that a writ of mandamus issue in accordance with the prayer of a second amended and supplemental complaint, directing the payment of salaries due plaintiffs—firemen and patrolmen of the Town of Cicero—for certain semi-monthly periods of the years 1940 and 1941, and retaining jurisdiction to determine the rights of the parties as to salaries due in 1942.

The original complaint was filed June 7, 1940 to compel payment of salaries for the months of May and June of that year. These salaries having been paid, the suit was dismissed July 25, 1940. Upon petition filed the order of dismissal was vacated, the cause reinstated and leave given plaintiffs to file an amended and supplemental petition within five days. January 26, 1942, pursuant to leave granted with consent of the defendants, a second amended and supplemental complaint was filed. December 31, 1942 the court entered an order directing that the writ of mandamus issue, commanding the defendants forthwith to pay or cause to be

paid to each of the plaintiffs the sum of $700, less deductions for pension fund purposes as provided by law, representing salaries due and owing to each of said plaintiffs for certain semi-monthly periods in the years 1940 and 1941, and further finding that since the hearing in June 1942 defendants had fallen in arrears in payment of salaries to the plaintiffs for the months of November and December, 1942, and reserving jurisdiction for the purpose of determining the respective rights of the parties with regard to thexsalary due and owing to plaintiffs for the year 1942 and for the purpose of granting such other and further relief in the premises as justice may require.

It appears from the record in a second appeal in this case (Gen. No. 42780) that on the same day a third amended and supplemental complaint was filed.

It is unnecessary to refer to the alleged errors argued by the parties, as we are of the opinion the appeal must be dismissed because the order appealed from is not a final, appealable order.

By the terms of the order the court found that salary in addition to that which the defendants were commanded to pay was due and owing to the plaintiffs, and retained jurisdiction for the purpose of determining the rights of the parties in respect thereto. The situation here presented is not unlike that in ~~xxxxxx~~ Walters v. Mercantile Nat. Bank of Chicago, 380 Ill. 477. There a complaint was filed for the construction of a will. The court construed a single paragraph of the will, which it held was not necessarily related to the other questions raised by plaintiff, and in its decree recited "that the remaining questions involved in the construction of said Last Will and Testament should be and they will be disposed of by this Court in a decree to be presented to this Court at a later date." The Supreme court dismissed the appeal on its own motion, and said (485): "The parties had no power to litigate, and the court had no power to

determine, the issues raised by piecemeal and limit the finding and decree to one single question of many raised and litigated in the same cause. Such an order is not a final decree from which an appeal may be prosecuted. A decree is final and appealable only where it terminates the litigation between all of the parties on the merits so that when it is affirmed the court below has only to proceed with its execution." In discussing section 50 of the Civil Practice Act, the court said (487): "The applicable provisions of the Civil Practice act, even if construed to authorize separate decrees to be entered in a case of this kind, do not make such decrees final until the termination of the litigation by the decision of all the questions and issues raised between all the parties to the suit. (Rogers v. Barton, 375 Ill. 611; McDonald v. Walsh, 367 id. 529.)"

The trial court should not have determined the case by piecemeal but until a final order is entered we cannot entertain an appeal. The appeal is dismissed.

APPEAL DISMISSED.

O'Connor, P. J., and Matchett, J., concur.

42809

321 I.A. 309

214

A. A. EXCAVATING COMPANY, an Illinois corporation, ANTHONY PALUMBO, JULIA G. PALUMBO and JOSEPH CAPARELLI,

Appellees,

v.

FIRST UNITED FINANCE CORPORATION, an Illinois corporation, R. W. FRIEDER and T. D. POWELL,

Appellants.

APPEAL FROM CIRCUIT, COOK COUNTY.

294

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs are the A. A. Excavating Company, a corporation, its president, its secretary and its general manager. The corporation formerly carried on an excavating and trucking business in Chicago. Its office was at 3143 Harrison street, where it kept its equipment, trucks, etc., in a garage. The individual plaintiffs are the only stockholders of the corporation. Its business was operated with dump trucks, tractors and trailers.

Defendant corporation is in the mortgage loan business. Its business is conducted at 9 West Washington street, Chicago.

August 4, 1941, plaintiff A. A. Excavating Company borrowed from defendant corporation $7,000. It gave a note executed by it and by its officers personally. This note was for $8,900, payable in installments of $393.75 each, the first September 4, 1941, and like installments payable on the 4th day of each succeeding month thereafter for ten months, after which a final payment of $4,568.75 was to be made on the 4th day of August, 1942.

To secure payment of this note plaintiffs executed a chattel mortgage of the same date, conveying to defendant finance company its equipment, trucks, etc., at 3143 Harrison street. The chattel mortgage contained the usual provisions

as to payment of installments due, placing of insurance by the mortgagors, and right of the holder of the note to foreclose in case of default or if the holder should feel itself unsafe or insecure.

Default was made in the payment of the first installment. Plaintiffs did not furnish insurance as provided by the terms of the mortgage, and on the day of default in payment surrendered the insurance it theretofore carried. A few days prior to this another corporation holding a prior mortgage against two of the trucks was allowed to take possession. The finance company was informed of this by letter of the A. A. Company of August 30, 1941.

After plaintiffs defaulted in payment and after information as to other defaults, the defendant finance company (owner of the note and mortgage) on September 8, 1941, demanded payment of the amount due, gave notice that unless the installment due was paid by September 11, 1941, foreclosure proceedings would be started on September 12th. No payment was made then or thereafter, nor has there been any tender of such payment at any time.

September 11, 1941, defendant Powell, an employee of the finance company, mailed notice of foreclosure to plaintiffs, stating that the sale would be held at 10 A. M. on September 18, 1941, at 3143 Harrison street, Chicago. The time of sale was continued from time to time and finally held (as defendants say) September 26, 1941. The purchaser was defendant corporation for the price of $4,500, in bulk.

There is some dispute as to whether there was actual bidding at the sale. It does not appear there was any other bidder. A report of such sale was sent to the A. A. Excavating Company October 2, 1941. No objection was then made thereto by plaintiffs.

December 6, 1941, plaintiffs caused to be served a

as to payment of [illegible] by the
mortgagors, the right of [illegible] in
case of default as [illegible] or
insure.

[illegible]
ment. Plaintiffs di[illegible]
terms of the mortgage, an[illegible]
[illegible] the insurance [illegible]
prior to this another [illegible]
against fire of the insure[illegible]. The
finance company was informed of [illegible]
Company of August 10, 1941.

After plaintiffs [illegible] further infor-
mation as to other details, [illegible]
of the note and mortgage, on August 8, 1941, [illegible]
of the amount due, gave [illegible]
was paid by September 7, 1941, [illegible]
started on September 8 [illegible]
after, [illegible]

September [illegible], 1941, [illegible]
the finance company, [illegible]
stating that the sum [illegible]
1941, at [illegible] Harrison Street, [illegible]
continued from time to time [illegible]
September 10, 1941. [illegible]
for the price of $[illegible].

There is some dispute [illegible]
bidding at the sale. [illegible]
bidder. [illegible]
Company October [illegible], 1941. [illegible]
by plaintiffs.

December 6, 1941, [illegible]

written demand for the return of the property to them within three days. The demand notified defendants that if the property was not returned "an action for conversion" and for damages in the sum of $50,000 would be instituted for the wrongful taking of the property. The property was not returned. This action for $50,000 was filed December 19, 1941.

The complaint filed was in three counts. One was stricken by the court, another dismissed by plaintiffs. The case went to the jury on the first count, which in substance was for conversion. The jury returned a verdict for plaintiffs with damages assessed at $40,000. Defendants moved for a new trial and for judgment in their favor notwithstanding. Both motions were denied. Judgment was entered on the verdict, and this appeal followed.

The amount of this verdict shocks the conscience. Plaintiff corporation had been doing business at this place for about three months. There is no evidence indicating that much business was done or profits realized. There is evidence that their business during that time was almost negligible. The money advanced in consideration of the chattel mortgage and note was $7,000. In response to special interrogatories the jury found the value of all the trucks except the Ford to be $5,250. The valuation put on all the rest of the goods and chattels, as indicated by evidence of plaintiffs, was $12,435, a total value of $17,685. Nothing was ever paid on the note. If the note had been paid in full, this would have left a balance of $8,785, which conceding the right of plaintiffs to recover at all (by no means clear), in the absence of some special damage would seem to have been the utmost which could in fairness have been allowed as damages by the jury. Bowers Law of Conversion, sec. 682, p. 512; Sharp v. Nat. Bond & Investment Co., 260 Ill. App. 297.

Defendants say that in the trial of the case the

written demand for the return of the property [illegible] within three days. The demand notified defendants that the property was not returned "an action for conversion [illegible] in the sum of $50,000 would be instituted for the wrongful taking of the property. The property was not returned. [illegible] action for $50,000 was filed December 12, 1941.

The complaint filed [illegible] stated. [illegible] attacked by the court, another [illegible] liability. The case went to the jury on the first [illegible] was for conversion. The jury returned a verdict for defendants with damages assessed at $[illegible]. [illegible] trial and for judgment in their favor [illegible] motions were denied. Judgment was [illegible] and this appeal followed.

The amount of this verdict [illegible] plaintiff corporation had been doing business [illegible] for about three months. There is no [illegible] much business was done or profits [illegible] that their business [illegible]. The money advanced in connection [illegible] and note was $2,000. [illegible] the jury found the value [illegible] be $5,500. The valuation [illegible] and chattels, as indicated [illegible] $12,435, a total value of [illegible] on the note. If the note [illegible] have left a balance of $[illegible] plaintiffs to recover at all [illegible] absence of some special [illegible] amount which could in fairness [illegible] by the jury. Bowers v. [illegible] Sharp v. Kat. Cont. & Investment Co., [illegible]

Defendants say that in the trial of the [illegible]

fundamental differences between trover (a common law action) and replevin (which in this state is a statutory cause of action: see Ill. Rev. Stat., chap. 119) were disregarded in the admission of evidence and instructions to the jury. The court on the trial, over the objection of defendants, permitted evidence to be given by plaintiffs tending to show the rental value of the trucks after the alleged conversion and up to the time of trial. Defendants say this might have been proper in a case of replevin (Cottrell v. Gerson, 296 Ill. App. 412), but it is not proper or permissible in an action for conversion or trover nor where, as here, special damages were not pleaded. Adams v. Gardner, 78 Ill. 568; Sedgwich on Damages, 9th ed. 497 E. Plaintiffs point out that at common law trover is a species of action on the case (Wholesale Grocers Corp. v. Richheimer Brokerage Co., 233 Ill. App. 64, 66-68) and that under the provisions of the Civil Practice Act the distinctions between common law forms of action have been abolished and that the pleadings are to be construed with a view to doing substantial justice between the parties.

We have no desire to explore the ancient learning on differences between actions of trespass and trespass on the case. We agree that the construction of pleadings should always be in the interest of justice. However, the Practice Act has not changed the fundamental nature of things. A long line of cases in Illinois hold that in an action for trover or conversion the true measure of damages ordinarily is the value of the property at the time of the conversion with interest. The Supreme Court so held in Sturges v. Keith, 57 Ill. 451; in Janeway v. Burton, 201 Ill. 78; in Schwitters v. Springer, 236 Ill. 271, and this court has so held in Genslinger v. New Ill. Athletic Club, 252 Ill. App. 298, and Ahrens v. Bihss, 256 Ill. App. 420. We think this is the correct general rule. Bowers Law of Conversion,

fundamental difference between [illegible] and replevin (which in [illegible] actions: see [illegible]) [illegible] the admission of evidence [illegible] court on the trial, over the objection [illegible] evidence to be given [illegible] value of the trees after [illegible] time of trial. Defendants [illegible] a case of replevin (Potter [illegible] but it is not proper or [illegible] or trover nor there, as here, [illegible] Adams v. Gaither, 72 Ill. [illegible] 497 E. Plaintiffs point out that [illegible] species of action on the case ([illegible] v. Richmond Tropical [illegible] under the provisions of the civil [illegible] between common law forms of [illegible] the pleadings are to be construed [illegible] tial justice between the parties.

We have no desire to explore [illegible] differences between actions of trespass [illegible] case. We agree that the [illegible] be in the interest of justice. However, [illegible] not changed the fundamental nature of [illegible] cases in Illinois hold [illegible] the true measure of damages [illegible] at the time of the conversion with interest. [illegible] so held in Byrnes v. Smith, 27 Ill. [illegible] 201 Ill. 78; in Schlesinger v. [illegible] court has so held in Zwerdlinger v. [illegible] Ill. App. 292, and Aurora v. Hillman, [illegible] think this is the correct general rule. [illegible]

chap. 12, sec. 630, p. 459.

The cases cited by plaintiffs to the contrary on this point are cases where the suit was either brought on or arose out of replevin statutes. Broadwell v. Paradice, 81 Ill. 474, 477; Frank v. Matson, 211 Ill. 338, 347-348; Ginsburg v. Bartlett, 262 Ill. App. 14, 38. There are reasons for the distinction in these two kinds of cases. A suit in replevin necessarily involves the right to recover possession of the actual thing taken and damages for its detention. A suit for wrongful conversion is a suit for the value of the thing which has been wrongfully taken. It assumes that when judgment is recovered and has been paid by the defendant, the property taken becomes the property of defendant. Hodur v. Cutting, 248 Ill. App. 145. Recovery of interest on the value from date of conversion would be inconsistent with the allowance of damages to plaintiff for the use of the property. We do not question there may be circumstances under which the plaintiff can elect whether he will claim interest on the value of the property taken or damages for being deprived of the use of it, but no such case is stated here.

Moreover, the testimony given in this case concerning the rental value of the property foreclosed on was of little value from any standpoint. In the first place, the witness who gave it was not qualified by experience. In the second place, in fixing the rental value of the trucks no allowance was made for the cost of labor necessary in using them, of gas necessary to run, or the cost of keeping the same in repair, insurance, wear and tear, management etc. The evidence was worse than worthless and well designed to mislead and confuse the jury. At first the court sustained an objection to this evidence but finally admitted it with apparent hesitation. The judge said, "Well, I am going to let you go ahead if you are sure you are right." Not only was the evidence admitted but the jury instructed that in finding the amount of damage the jury "may consider the value

chap. 12, sec. 639, p. 492.

The cases cited by plaintiff [illegible] correctly on this point are cases where the suit was [illegible] on or rescue out of replevin statutes. [illegible] v. [illegible], 1 [illegible], 492, 492; Frank v. Larson, [illegible], [illegible] v. [illegible], 262 Ill. App. 14, 26. There are reasons for the distinction in these two kinds of cases. [illegible] in [illegible] necessarily involves the right to recover possession of the [illegible] and damages for its detention. [illegible] for wrongful conversion is a suit for the value of the [illegible] been wrongfully taken. It assumes that when judgment is recovered it has been paid by the defendant, the property then becomes the property of defendant. Rohde v. [illegible], [illegible] Ill. App. 143, recovery of interest on the value from date of conversion would be inconsistent with the allowance of damages to plaintiff for the use of the property. We do not question [illegible] may be circumstances under which the plaintiff can [illegible] will claim interest on the value of the property [illegible] for being deprived of the use of it, but no such [illegible] is shown here.

Moreover, the testimony [illegible] the rental value of the property [illegible] little value from any standpoint. [illegible] who gave it was not qualified by experience. In the [illegible] in fixing the rental value of [illegible] for the cost of labor necessary [illegible] to run, or the cost of [illegible], tear and wear and tear, management etc. [illegible] loss and well designed [illegible] the court sustained an objection to [illegible] mitted it with [illegible] going to let you go ahead if you [illegible] only was the evidence admitted but the jury instructed that in [illegible]

of the property at the time it was taken, and what the reasonable rent would be for the said property in question for the period of time the property in question was wrongfully detained or wrongfully withheld by the defendants, in so far as the same is shown by the evidence in the case. This included post Pearl Harbor values of such articles and their use. We hold that the admission of this evidence and the giving of this instruction was reversible error.

Aside from the damages, if any, the only question for the jury in this case was whether the sale of the property was made in the proper manner. The validity of the mortgage, the default in payment of the note, the demand for payment, the posting of notices, the report of sale with details as required by statute were proved. For the first time and in this court plaintiffs make the point that the chattels were mechanic's tools and foreclosure in any way except by suit in equity is illegal under section 24, chapter 95, Illinois Revised Statutes. We hold the statute not applicable to the facts of the case. Moreover, the suit was not brought nor the complaint framed on that theory. Plaintiffs cannot shift their position in this court.

Plaintiffs say there was no reasonable basis for defendants to believe the loan was insecure or unsafe and that their action in seizing the property was arbitrary and unreasonable. We hold as a matter of fact and of law the defendant creditor had many reasons to feel unsafe and insecure.

It is suggested that a letter sent by the finance company to the A. A. Company on the day the note was executed, to the effect that an allowance of $250 would be made on payment of the final installment of the note for $8,900, "provided the monthly installments are paid not later than fifteen days past due dates," had the effect of extending the time of payment of each installment fifteen days, and that nothing, therefore, was due at the time the mortgage was foreclosed. We hold

of the property at the time it was taken, [illegible] the reason-
able rent would be for the said property [illegible] for the
period of time the property in question was wrongfully detained
or wrongfully withheld by the defendants, in [illegible] the same
is shown by the evidence in the case. This includes post fees
Rudor values of such articles and their use. We hold that the
admission of this evidence and the giving of this instruction
was reversible error.

Aside from the issues, [illegible] the only question for
the jury in this case was the [illegible] of [illegible] was
made in the proper manner. The validity of the mortgage, the
default in payment of the note, [illegible] for foreclosure, the
posting of notices, the report of [illegible] a regular
by statute were proved. For the [illegible] court
plaintiffs make the point that the statutes were [illegible]
and foreclosure in any way [illegible] under section 4, chapter [illegible] evidence [illegible]. We
hold the statute not applicable to [illegible]
over, the suit was not [illegible] theory. Plaintiffs cannot shift their [illegible] court.

Plaintiffs say that [illegible] for [illegible]
ants to believe the loan was [illegible] and that their
action in seizing the property was [illegible]
We hold as a matter of fact and of law the defendant [illegible]
had many reasons to feel [illegible] and [illegible].

It is also asked that a [illegible] to
company to the A. A. Company or [illegible]
to the effect that an allowance of [illegible] could be made [illegible]
ment of the final installment of [illegible] for [illegible], provided
the monthly installments are paid not later than fifteen days
past due dates," and the effect of [illegible] the time of pay-
ment of each installment fifteen days, and that nothing, there-
fore, was due at the time the mortgage was foreclosed. We hold

this contention without merit.

For the errors indicated the judgment will be reversed and the cause remanded.

JUDGMFNT REVERSED AND
CAUSE REMANDED.

O'Connor, P. J., and Niemeyer, J., concur.

42753

ANN JESSIE BLACKMAN, Administratrix with the Will annexed of the Estate of OLIVER J. BLACKMAN, and individually, Appellant,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, THE CONTINENTAL CASUALTY COMPANY, a corporation, and THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation. Appellees.	

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order denying a motion to vacate a prior order dismissing her action for want of prosecution.

The record shows that Oliver J. Blackman received injuries January 1, 1937, from which he died July 20, 1937; on July 11, 1939 plaintiff was appointed administratrix of his estate and suit was instituted July 17, 1939 against the railroad, by whom he was employed, and against two insurance companies on disability policies. Notice to place the case on the trial call was filed August 4, 1941; November 17, 1941 the case was dismissed for want of prosecution, and that order was vacated and the case reinstated December 4, 1941 by the judge who entered the order now appealed from. September 17, 1942, pursuant to notice to plaintiff, her attorneys withdrew. January 5, 1943, the case appearing on the trial call, it was again dismissed for want of prosecution. January 18 the present attorneys entered their appearance as attorneys for plaintiff; January 23 they served notice of motion asking approval of their substitution as attorneys for plaintiff, that the order of dismissal of January 5 be vacated and the cause be reinstated on the trial calendar

and that plaintiff be given time to amend the complaint. January 25 this motion was denied.

In support of the motion plaintiff's affidavit was filed. In this affidavit plaintiff stated that several months before January 5, 1943 she had engaged the firm of Bowe and Bowe to prosecute her case and was under the impression that they were in fact going to prosecute it; that on January 4 she received a letter from them advising her to seek other attorneys; that on the same day she secured her present attorneys, who appeared in the court January 5 and sought to have the cause continued to such time as they could make proper arrangements for trial. The letter from Bowe and Bowe states they had decided not to represent her; that they had advised her they would not handle the insurance claims and had concluded they would not handle the case against the railroad company; that the case would appear on the trial call on January 5 or shortly thereafter and plaintiff should have a lawyer appear for her when the case was called; that they had not entered their appearance. No transcript of proceedings has been filed. The record does not show the meeting mentioned in plaintiff's brief as having taken place in the Judge's chambers on the day the case was dismissed, at which it is said the Judge promised to reinstate the case on motion. This will be disregarded.

Defendants object that the order appealed from is not a final, appealable order. Our courts have held that the judgment of a court denying a motion to vacate a judgment is a final judgment from which an appeal may be taken. City of Park Ridge v. Murphy, 258 Ill. 365; Keithley v. County of Clark, 206 Ill. App. 500; Cohn v. Bernstein, 205 Ill. App. 325. In the last cited

and that plaintiff be given time to amend the complaint. January 25 this motion was denied.

In support of the motion plaintiff's affidavit was filed. In this affidavit plaintiff stated that several months before January 5, 1943 she had engaged the firm of Howe and Howe to prosecute her case and was under the impression that they were in fact going to prosecute it; that on January 4 she received a letter from them advising her to seek other attorneys; that on the same day she secured her present attorneys, who appeared in the court January 5 and sought to have the cause continued to such time as they could make proper arrangements for trial. The letter from Howe and Howe states they had decided not to represent her; that they had advised her they would not handle the insurance claims and had concluded they would not handle the case against the railroad company; that the case would appear on the trial call on January 5 or shortly thereafter and plaintiff should have a lawyer appear for her when the case was called; that they had not entered their appearance. No transcript of proceedings has been filed. The record does not show the meeting mentioned in plaintiff's brief as having taken place in the Judge's chambers on the day the case was dismissed, at which it is said the Judge promised to reinstate the case on motion. This will be disregarded.

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case the court held that the defeated party could appeal from the judgment entered and from the order denying his motion to vacate the judgment.

The record in this case shows lack of diligence in the prosecution of this action. It was not started until within three days of two years after the death of Blackman. It was not noticed for trial until more than two years after its institution. Plaintiff then permitted it to be dismissed for want of prosecution, and the court reinstated it. From the record properly before us it appears that although plaintiff was notified the case would probably appear on the trial call January 5, 1943 and that she employed her present counsel on January 4, they did not file their appearance until January 18; that the motion to vacate was presented on January 25, together with a motion to amend the complaint, over three and a half years after the institution of the suit. The court properly dismissed the case for want of prosecution. Daly v. City of Chicago, 295 Ill. 276; Hicks v. Bekins Moving & Storage Co., 115 F.2d 406.

If we could hold that the subsequent activity of plaintiff's new counsel showed diligence, that fact would not require vacation of the order of dismissal. In the Hicks case the court said: "Moreover, an order of dismissal may be granted, notwithstanding the plaintiff has been stirred into action by the impending dismissal, for subsequent diligence is no excuse for past negligence. Holtzoff v. Dodge & Olcott Co., 134 App. Div. 353, 119 N. Y. S. 47, 49." In Crystal Lake Country Club v. Scanlan, 264 Ill. App. 44, cited by plaintiff, the court said: "It is the well settled rule in such cases that parties seeking to have an ex parte judgment set aside must show due diligence."

Plaintiff has not met this requirement, and the order appealed from is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

42780

321 I.A. 310

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOSEPH HOREJS, HERBERT UTZ, JOSEPH CHLUSTINA, OTTO SCHALK, et al.,
Appellees,

v.

GEORGE STEDRONSKY, President, EDWARD GRISKO, GUSTAVE RANDA, JOSEPH DANEK, RUDOLPH J. KREJCI, Trustees, and as members of the Board of Trustees of the Town of Cicero, ANTON J. KRUPICKA, Clerk, JERRY J. VITERNA, Collector, LEO KASPERSKI, Supervisor, and FRANK J. CHRISTENSON, Assessor, Town of Cicero, Illinois,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

217

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment directing the issuance of a writ of mandamus, entered upon a third amended and supplemental petition, commanding the defendants to pay or cause to be paid to each of the plaintiffs, as policemen and firemen of the Town of Cicero, the sum of $385, (less deductions for pension fund purposes as provided by law) representing the salaries lawfully due and owing to each of the plaintiffs for the months of November and December, 1942.

An appeal from an order directing a writ of mandamus upon a second amended and supplemental complaint in this cause was before us (Gen. No. 42697) and the appeal dismissed in opinion filed today for the reason that the order appealed from was not a final order or judgment.

By the order entered December 31, 1942 on the second amended and supplemental complaint, jurisdiction was retained for the purpose of determining the rights of the parties in respect to the salaries commanded to be paid by the order before us. On the same day the third amended and supplemental complaint,

involved in this appeal, was filed. Defendants moved to strike this complaint because of want of jurisdiction of the court. This motion was denied January 18, 1943, and defendants elected to stand upon their motion. March 12, 1943 defendants appealed from the order of December 31, 1942, entered upon the second amended and supplemental petition by filing notice of appeal and proof of service of same. Having held that this former appeal was premature, the objection of defendants that the court was without jurisdiction to proceed to judgment on the third amended and supplemental petition because of the former appeal need not be noticed.

April 9, 1943 the order now appealed from was entered. Defendants contend that the third amended and supplemental complaint is defective and that plaintiffs cannot procure a writ to compel the payment of salaries becoming due after the institution of the suit, on June 7, 1940. By section 39 of the Civil Practice act (Ill. Rev. Stat. 1941, chap. 110. par.163) supplemental pleadings, setting up matters which have arisen after the original pleadings have been filed, may be filed within a reasonable time by either party by leave of court and upon terms. This provision makes the general rules of chancery as to supplemental bills applicable to actions at law, (McCaskill, Illinois Civil Practice Act Annotated, section 39) and therefore upon proper pleading permits judgments to be entered upon facts existing at the time of hearing of actions at law instead of at the time of the commencement of the suit, as under the former pratice. The employment of the plaintiffs as policemen and firemen is a continuous employment, so that the salaries claimed under the third amended and supplemental complaint were based upon the same employment as the salaries claimed under the original complaint. The court was acting within its discretion when it permitted the third amended and supplemental complaint to be filed.

involved in this [illegible]
this complaint become [illegible]
motion was denied January [illegible]
stand upon their motion. [illegible]
the order of December [illegible]
and supplemental petition [illegible]
service of same. [illegible]
nature, the objection of [illegible]
jurisdiction to proceed to [illegible]
supplemental petition because of [illegible]
noticed.

April 8, 1940 [illegible] entered.
Defendants contend that [illegible]
is defective and that [illegible]
the payment of a limited [illegible]
suit, on June 7, 1940. [illegible]
(III. Rev. Stat. 1941) [illegible]
setting up matters which [illegible]
have been filed, may be [illegible] by
party by leave of court [illegible]
general rules of chancery [illegible]
sections 41 [illegible] (Cosgrove [illegible] Annotated,
section 34) an [illegible]
be entered upon [illegible]
at law instead of [illegible]
under the former practice. [illegible]
policeman and [illegible]
salaries claimed under [illegible]
were based upon the same [illegible]
the original complaint. [illegible]
when it permitted the [illegible]
be filed.

The objections made to the third amended and supplemental complaint are that it failed to allege that moneys appropriated by the Town of Cicero in its annual appropriation ordinance for the year 1942 had been received by it, that it failed to show that the Town of Cicero had any moneys on hand in any funds whatever legally applicable to the payment of plaintiffs' salaries, and that the complaint was prematurely filed in that the salaries for the last half of December were not due when the petition was filed, on December 31, 1942. The latter objection will be ignored. People ex rel, Krejci v. Kelly, 279 Ill. App. 22, involved a complaint for a writ of mandamus to compel payment of a judgment against the City of Chicago. It was objected that the complaint was defective in that it failed to allege there was money available in any particular fund or tax levied or collected to discharge the city's liability under the judgment. This court said (27-28): "A further consideration is that any inability on the part of the defendants to pay the judgment is not raised by demurrer but must be presented by answer. In DeWolf v. Bowley, 355 Ill. 530, cited by defendants, it was held that want of funds is a complete answer to a petition for mandamus. In People ex rel, Pollastrini v. Whealan, 269 Ill. App. 281, a mandamus case, we held that the burden was not on the petitioner to show that there were sufficient funds in the treasury to pay the amount due him. The decision in this respect was affirmed by the Supreme Court in 353 Ill. 500. In the recent case of People v. Rice, 356 Ill. 373, it was held that if there are any facts which would excuse payment they must be 'presented by answer and supported by proof. The demurrer raised no such question. Board of Supervisors v. People, 226 Ill. 576. '" In People v. City of Peoria, 374 Ill. 313, 321, the court said: "A city is liable for its indebtedness and it is the duty

of the city authorities to make proper appropriation for the payment of the same. If it fails in this duty the courts, upon the proper showing, will grant the creditors relief. If an application for relief is made and it is found that the claim is a proper debt against the city, the burden is upon the city to show that it is doing all in its power to pay the indebtedness. (City of Chicago v. People, 215 Ill. 235.)"

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J, concur.

of the city authorities [illegible]
payment of [illegible]
the proper authority [illegible]
application for relief [illegible]
is a person who [illegible]
when [illegible] it is acting [illegible]
(City of Chicago v. Moore, [illegible] Ill. [illegible]).

The judgment is affirmed.

O'Connor, J., [illegible]

321 I.A. 311

42789

In the Matter of the Estate of
ELI DAICHES, Deceased,

BELLE T. DAICHES, Executrix of the Estate of Eli Daiches, Deceased,
Appellant,

v.

ISAAC B. LIPSON,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

83
218

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Petitioner, as executrix of the estate of Eli Daiches, deceased, appealed from an order of the Circuit court dismissing her petition filed in the Probate court seeking to open said estate, vacate a certain order and asking for an order directing the respondent to restore to the estate $13,500, alleged to have been unlawfully withdrawn by respondent from the estate.

The petition, filed in May 1942, is defective in that it fails to allege facts as a basis for the conclusions of fraud and misconduct on the part of respondent contained in the petition. Respondent answered, denying the charges against him and also denying that petitioner was inexperienced in business matters. The answer sets up as an affirmative defense that petitioner employed respondent as an attorney to prosecute certain claims of the estate against The Thos. M. Bowers Advertising Agency, and others, and agreed to pay him for his services 20 per cent of the amount received on settlement of the claims before trial and additional compensation in the event a trial is started or the cases carried to the Appellate and Supreme courts; that this agreement was evidenced by a written contract dated October 22, 1934; that upon motion of

petitioner the agreement was approved by order of the Probate court entered March 1, 1935; that thereafter a settlement was effected for the sum of $67,500, paid to the estate by two checks, for $54,000 and $13,500; that this settlement, upon motion of petitioner, was approved by order of the Probate court; that the check for $13,500, being 20 per cent of the settlement, was endorsed by petitioner and delivered to respondent in payment of his services; that upon motion of petitioner, representing that $54,000 was the net proceeds of the settlement, certain other expenses incurred by petitioner were allowed; that the estate was closed in 1937, and thereafter petitioner examined respondent's books relating to his transactions with her and the estate and certain adjustments were made, constituting an account stated. No reply was filed by the petitioner.

On hearing in the Probate court the relief prayed was denied in an order reciting "That no fraud or deception was practiced by the respondent either upon the Court or the petitioner; that both the Court and the petitioner were at all times fully and adequately informed of the full amount of the settlement, of the application of $13,500 thereof to the payment of respondent's attorney's fees; that the payment was proper and authorized by orders of this Court properly entered." On appeal to the Circuit court petitioner offered no evidence other than her petition and respondent's answer thereto, but moved the court for an order directing the defendant to turn over $13,500 to the estate upon the admissions contained in the sworn answer of respondent. The court denied the relief prayed for and dismissed the petition. Petitioner appealed.

The answer of respondent set up a complete defense to the petition. No evidence having been offered in support of petitioner's

2.

petitioner the [illegible]
court entered [illegible]
entitled for the [illegible]
for [illegible]
petitioner, [illegible]
check for [illegible]
by petitioner [illegible]
that upon motion of petitioner, [illegible]
met proceeds of the [illegible]
petitioner was [illegible]
thereafter petitioner [illegible] to his
transactions with her [illegible]
made, constituting [illegible]
petitioner.

According to [illegible]
in an order [illegible] preceded by the
respondent either upon [illegible]
court in the petitioner [illegible]
ed of the full amount of the settlement [illegible]
thereof to the payment of [illegible]
proceed the order [illegible]
contrary." [illegible] to the [illegible]
evidence [illegible]
[illegible] the court for [illegible]
[illegible] to the [illegible]
manner or proceeding. [illegible]
discharge the petition [illegible]

The [illegible]
petition. [illegible]

charges of fraud and misconduct, the court could do nothing but deny the relief sought and dismiss the petition. The order appealed from is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

charges of fraud and embezzlement [illegible]
the police courts and elsewhere [illegible]
is attributed.

O'Connor, P. J., and Mayne [illegible]

42796

GATEWAY SECURITIES COMPANY, a corporation, Appellee, v. ERMIE SCHULTZ, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

A summary judgment for $2,429.75 and costs, for unpaid principal and interest due on a contract for the purchase of a vacant lot in Chicago, was rendered against defendant. She appealed from an order denying her motion to vacate and set aside the judgment and set the cause for hearing on her amended answer and counterclaim.

The contract involved was executed March 12, 1929, and on June 30, 1929 was assigned by Daniel A. Quinn, vendor, to plaintiff. Defendant made monthly payments on the contract to plaintiff to and including the month of March, 1932. No further payments of principal or interest were made. This action was commenced December 17, 1941. Defendant appeared and filed a jury demand. She also filed an answer admitting the execution of the agreement and charging fraud by plaintiff's assignor, in that Quinn had represented to her that he "had made arrangements for the establishment and building of a railroad station on certain lots in the same block or vicinity as said Lot 22 in Block 2 mentioned in the complaint, and that he had made arrangements to have interurban service at all times from said station to and from Chicago and other stations." She also filed a counterclaim for the recovery of the money paid by her, with interest from February 21, 1931. Upon motion of plaintiff the answer and

42796

GATEWAY SECURITIES COMPANY, a corporation, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
ERNIE SCHULTZ, Appellant.	

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

A summary judgment for $2,429.76 and costs, for unpaid principal and interest due on a contract for the purchase of a vacant lot in Chicago, was rendered against defendant. She appealed from an order denying her motion to vacate and set aside the judgment and set the cause for hearing on her amended answer and counterclaim.

The contract involved was executed March 12, 1929, and on June 30, 1929 was assigned by Daniel A. Quinn, vendor, to plaintiff. Defendant made monthly payments on the contract to plaintiff to and including the month of March, 1932. No further payments of principal or interest were made. This action was commenced December 17, 1941. Defendant appeared and filed a jury demand. She also filed an answer admitting the execution of the agreement and charging fraud by plaintiff's assignor, in that Quinn had represented to her that he "had made arrangements for the establishment and building of a railroad station on certain lots in the same block or vicinity as said Lot 22 in Block 2 mentioned in the complaint, and that he had made arrangements to have interurban service at all times from said station to and from Chicago and other stations." She also filed a counterclaim for the recovery of the money paid by her, with interest from February 21, 1931. Upon motion of plaintiff the answer and

counterclaim were held substantially insufficient in law and dismissed and stricken from the files by Judge Allegretti, then hearing non-jury cases. Subsequently an amended answer and counterclaim were filed, particularizing the alleged fraud, as above outlined, and alleging that defendant learned of the fraud in the year 1931, but not specifying the time of the year when the fraud was discovered or explaining or excusing the continuance of payments thereafter until March, 1932.

On July 22, 1942 notice was served on counsel for defendant of the filing of plaintiff's motion to dismiss the amended counterclaim and for a summary judgment on the pleadings, and that after the summer recess plaintiff would ask that the cause be set for hearing. In support of the motion for summary judgment an affidavit by one of plaintiff's attorneys was filed. December 1, 1942, ascappears by affidavit of plaintiff's counsel, notice was mailed to defendant's attorneys, to the address given by them for service of motions, that plaintiff would appear before Judge Schwaba, then hearing non-jury cases, on December 4th and ask to have the cause set for hearing on plaintiff's motion to dismiss the counterclaim, to strike certain paragraphs from the amended answer and for summary judgment. This notice is receipted for by defendant's attorneys on the latter date. By order filed January 22, 1943, but dated January 21, 1943, entered by Judge Schwaba, defendant's amended counterclaim was dismissed and stricken from the files and summary judgment entered against her, as stated above.

On February 19, 1943, pursuant to notice on his co-counsel and attorneys for plaintiff, one of the attorneys for defendant filed his petition setting up that upon the filing of the jury demand the cause was placed on Jury Calendar No. 6; that in June, 1942 the parties appeared before the Judge hearing non-jury cases, when leave was given

counterclaim were held substantially insufficient in law and dismissed and stricken from the files by Judge Alfermatt, then hearing non-jury cases. Subsequently an amended answer and counterclaim were filed, particularizing the alleged fraud, as above outlined, and alleging that defendant learned of the fraud in the year 1931, but not specifying the time of the year when the fraud was discovered or explaining or excusing the continuance of payments thereafter until March, 1932.

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On February 19, 1943, pursuant to notice on file co-counsel and attorneys for plaintiff, one of the attorneys for defendant filed his petition setting up that upon the filing of the jury demand the cause was placed on Jury Calendar No. 6; that in June, 1942 the parties appeared before the Judge hearing non-jury cases, when leave was given

to file an amended answer and counterclaim; that notice of the motion before Judge Schwaba on December 4, 1942 was not received by petitioner (no mention being made of his co-counsel); that there appears to be no order of record continuing and setting the motion for summary judgment on January 21, 1943, and that petitioner was not aware of or informed that the cause was then set for hearing; that defendant has a good and meritorious defense and prays to have his constitutional rights to trial by jury. The prayer of the petition is that the summary judgment be vacated and set aside and the cause set for hearing on the pleadings. There is no denial by petitioner's co-counsel of notice and knowledge of proceedings had and taken, resulting in the summary judgment. By orders properly entered the cause was transferred from the non-jury calendar to Jury Calendar No. 6, and on April 7, 1943 Judge Lewe, to whom calendar 6 had been assigned, entered an order finding that defendant and counterclaimant had filed a jury demand but that the file of the case was erroneously stamped "non-jury list;" that the defendant at various times appeared before the judge to whom non-jury cases were assigned and submitted to the entry of orders without protest; that defendant by her amended answer and counterclaim presented no triable issues and that plaintiff is entitled to a summary judgment on the pleadings. It was then ordered that the motion to vacate the summary judgment, stay the execution and set the case for hearing, be denied, and that the summary judgment remain in full force and effect.

Although this case erroneously appeared on the non-jury calendar, defendant having appeared without objection before the non-jury judge, she cannot now complain of this irregularity. Freise v. Mid-City Trust & Savings Bank, 298 Ill. App. 17. The sufficiency of defendant's answers and counterclaims were passed upon by three trial judges, each of whom held them to be insufficient in law. Judge Lewe, who made the final decision, was the judge to whom Jury Calendar No. 6

to file an amended answer and counterclaim; that notice of the motion before Judge Schwabe on December 4, 1942 was not received by petitioner (no mentionbeing made of his co-counsel); that there appears to be no order of record continuing and setting the motion for summary judgment on January 21, 1943, and that petitioner was not aware of or informed that the cause was then set for hearing; that defendant has a good and meritorious defense and prays to have his constitutional rights to trial by jury. The prayer of the petition is that the summary judgment be vacated and set aside and the cause set for hearing on the pleadings. There is no denial by petitioner's co-counsel of notice and knowledge of proceedings had and taken, resulting in the summary judgment. By orders properly entered the cause was transferred from the non-jury calendar to Jury Calendar No. and on April 7, 1943 Judge Lewe, to whom calendar 6 had been assigned, entered an order finding that defendant and counterclaimant had filed a jury demand but that the file of the case was erroneously stamped "non-jury list;" that the defendant at various times appeared before the judge to whom non-jury cases were assigned and assented to the entry of orders without protest; that defendant by her amended answer and counterclaim presented no triable issues and that plaintiff is entitled to a summary judgment on the pleadings. It was then ordered that the motion to vacate the summary judgment, stay the execution and set the case for hearing, be denied, and that the summary judgment remain in full force and effect.

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had been assigned, and no objection is or could be made to his right to determine the question. The matter as to which fraud is charged related to something as to which information was open to defendant as well as to plaintiff's assignor. No facts are alleged justifying defendant's reliance upon the alleged misrepresentation without inquiry on her part. Bundesen v. Lewis, 368 Ill. 623; Malnick v. Rosenthal, 313 Ill. App. 249. Neither is any explanation given as to why defendant continued payments to and including March, 1932 - at least several months after she claims to have discovered the alleged fraud. Resnick v. Varouxakis, 319 Ill. App. 51; Kanter v. Ksander, 344 Ill. 408. For these reasons the amended answer and counterclaim were defective and the rulings of the respective trial judges were correct.

The order appealed from is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

had been assigned, and no objection is or could be made to his right to determine the question. The matter as to which fraud is charged related to something as to which information was open to defendant as well as to plaintiff's assignor. No facts are alleged justifying defendant's reliance upon the alleged misrepresentation without inquiry on her part. Burdeson v. Lewis, 386 Ill. 626; Malinoff v. Rosenthal, 313 Ill. App. 249. Neither is any explanation given as to why defendant continued payments to and including March, 1932 - at least several months after she claims to have discovered the alleged fraud. Reanick v. Varovakis, 313 Ill. App. 81; Kenter v. Kaender, 344 Ill. 402. For these reasons the amended answer and counterclaim were defective and the rulings of the respective trial judges were correct.

The order appealed from is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

Of Nuisance

Abstract

Gen. No. 9902. Ag. No. 7.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1943.

GENEVA WEST and RONALD WEST, Plaintiffs-Appellees, vs. SAMUEL PORRITT, JR., Defendant-Appellant.	Appeal from Circuit Court, Knox County.

WOLFE,-- J.

The appellees, Geneva West and Ronald West filed suits against Samuel Porritt, Jr., in the Circuit Court of Knox County, Illinois, for injuries they sustained in a collision between a car in which they were riding and the car of the appellant defendant. The complaints, so far as the material facts are concerned, are identical. It is alleged in the complaint of Geneva West that she was a passenger in the car driven by her son, Ronald West. The cases were consolidated for trial and submitted to a jury, which found the issues in favor of the plaintiffs, and assessed Geneva West's damages at $2,350.00 and Ronald West's damages at $887.91. At the close of the

plaintiffs' testimony, and also at the close of the testimony of the defendant, the defendant entered motions for a directed verdict. Both motions were overruled. The defendant then entered a motion for judgment notwithstanding the verdict, and in the alternative for a new trial. This motion was also overruled. Judgments in favor of the plaintiffs were entered for the amount as found in the verdicts.

Riding in the same car with the appellees, at the time of the collision in question, were Ruth West, the wife of Ronald West, and Arden West, the father of Ronald West. They also filed suits against Samuel Porritt, Jr., for the damages they sustained in the same collision, and each procured a judgment against him. The two cases were before this Court on review. In the cases of Ruth West and Arden West vs. Samuel Porritt, Jr., Reported in 318 Ill. App. page 366, we find that the evidence is practically the same as in the present case, and we there stated that the evidence was sufficient to sustain the verdict and affirmed the judgment. Without stating fully the evidence in the present case, it is our conclusion that the evidence preponderates greatly in favor of the appellees.

It is insisted by the appellant in this case that the evidence does not sustain the contention of Geneva West, that she was a guest in the car of her son, Ronald West, but that Ronald West was her agent, or servant in taking her home. We cannot agree with this contention. The evidence fully sustains

plaintiffs' testimony, [illegible] of the wife [illegible] vessel. [illegible] entered a [illegible] and [illegible] was [illegible] overturned. [illegible] for two months [illegible].

[illegible] time of the collision [illegible] of Ronald West, [illegible] They also filed with a [illegible] damages [illegible] a judgment against [illegible] on review. [illegible] Formally, [illegible] the evidence is practically [illegible] case, and we [illegible] the vessel [illegible] the evidence in the present [illegible] the evidence preponderates [illegible].

It is [illegible] evidence does not [illegible] she was a guest in the [illegible] Ronald West was [illegible] cannot agree with [illegible]

Geneva West's claim that she was a guest in her son's car at the time of the collision.

The appellant has divided his argument into points 1, 2 and 3. In point one it is directed solely to the weight of the evidence, and the Court's refusal to direct a verdict in favor of the defendant. So far as point one is concerned, we find no merit in either of the appellant's contentions. Points 2 and 3 are directed solely to the judgment of Ronald West. At the request of the plaintiffs, the Court gave to the jury Instruction No. 2, which is as follows: "The Court instructs the jury that the words 'guilty' or 'not guilty' as used in the form of the verdict in this case, are simply a legal form for a finding by the jury that damages should or should not be paid, and have no other effect whatever." Neither the appellant nor the appellees have cited any cases with reference to a similar instruction as having been approved, or criticized by a Court of Review. If this was the only instruction complained of, it might be said that it was harmless error in this case, as the evidence preponderates very strongly in favor of the plaintiffs right to recover. The Court gave Instruction No. 13, at the request of Ronald West, which is as follows: The Court instructs the jury that if you believe from the evidence that at and immediately prior to the collision of the automobiles driven by the plaintiff, Ronald West, and the defendant, Samuel Porritt, Jr., that the plaintiff was in the exercise of reasonable care and caution for his own safety and the safety of his

[illegible]

automobile, and that the collision was proximately caused by careless and negligent act or acts of the defendant, then it would be your duty to find the defendant guilty." This is a peremptory instruction, and our Courts have frequently held that such instructions should contain all the material and necessary elements that the jury should have in mind in making up their verdict. This instruction omits two necessary elements: One, that the jury should believe not merely from the evidence, but from a preponderance of the evidence that certain facts have been proven. The second omission is that the acts of negligence, which were the proximate cause of the injuries complained of, were not limited to the acts of negligence charged in the complaint. In the case of Seybold vs. Zimmerman 294 Ill. App. 138 at Page 143, we find this language: "Both of these instructions directed a verdict upon the finding of certain facts. Neither of the instructions required the jury to find the defendant guilty of negligence, as charged in the declaration. It is well established that an instruction which directs a verdict and authorizes a recovery generally without limiting the negligence to that charged in the declaration is reversible error. Herring v. Chicago & A. R. Co., 299 Ill. 214-217; Ratner v. Chicago City Ry. Co., 233 Ill. 169-172; Hackett v. Chicago City Ry. Co., 235 Ill. 116-130; Molloy v. Chicago Rapid Transit Co., 335 Ill. 164-171; Garnhart v. Reeves, 288 Ill. App. 159-160; Carnahan v. Public Serv. Co., 276 Ill. App. 277-279. The Court in the Ratner case, supra, says of such an

instruction: 'An instruction of this character permits the jury to wander afield and return a verdict against a defendant for what they might fancy to be an act of negligence though the act so considered by them to be negligent was one which the law would not recognize as actionable.'"

The appellees contend that in a case where general negligence is charged together with specific acts of negligence, such an instruction is proper, but our attention has not been called to any case where such instruction has been approved. The two instructions should not have been given. Point 3 of the appellant's argument is directed wholly to the evidence relative to Ronald West, and it is not applicable here, and we find no merit in this contention.

The judgment of Geneva West of $2,350.00 is hereby affirmed. The judgment in favor of Ronald West of $887.91 is hereby reversed, and the case remanded. The appellant, Samuel Porritt, Jr., is to pay one-half of the costs in this appeal and Ronald West is to pay one-half of the costs. The judgment is affirmed in favor of Geneva West, and reversed as to Ronald West.

Affirmed in Part and Reversed in Part.

321 I.A. 363
3-15-44

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A.D. 1943

Term No. 43M1 Agenda No.8.

MARY C. GASS MUELLER, Plaintiff-Appellant,	
vs.	Appeal from the Circuit Court of Jackson County.
FORD F. BITTLE, THE CONSOLIDATED COAL COMPANY OF ST. LOUIS, a Corporation, ED E. HOFFMAN and ALVIN NANCE, Defendants-Appellees.	

321 I.A. 363

BRISTOW, J.

This is an appeal by Plaintiff, Mary C. Gass Mueller, in whose favor a judgment was entered in the amount of $1550.58 against Appellee. A Complaint in Equity was filed by her on June 19, 1935, against Defendants, Ford F. Bittle, Ed E. Hoffman, Alvin Nance, and the Appellee, The Consolidated Coal Company of St. Louis, a Corporation. Bittle died during the pendency of the proceeding and no further action was taken against his Administrator. The decree made no finding against Defendants, Nance and Hoffman.

The original complaint alleges that the Plaintiff is and has been the owner of certain real estate described therein, since November, 1933, and that she rented about 180 acres of this land to Defendant, Bittle, on November 10, 1933, for one year, to be cultivated for one-third of the crops; that the following May, she gave Bittle permission to cut some willows, and that about May 30, 1935, she learned that, without any authority from her, Bittle had wrongfully cut a large amount of other timber which was not willow, and had sold such other timber made into mine ties and props to Appellee and Defendants, Hoffman and Nance. Among

other relief, the prayer was for an injunction and accounting and judgment. On February 26, 1936, an amendment was filed to the complaint which alleged that Bittle cut the trees from the 180 acres and from the other part of said lands and it asked that Defendants disclose all timber sold from that part of said land, to whom sold and purchased, and for an injunction.

After testimony had been partly taken on July 21, 1938, Plaintiff filed another amendment to the Complaint, alleging that, after the suit had been started, props were wrongfully removed from said premises by Defendants, or some of them, and asked for an accounting for same and exemplary and punitive damages for wrongfully selling or removing or buying the same during the pendency of the suit. It alleged that Plaintiff had been informed and believed and stated as a fact that Appellee, Hoffman and Nance, without right, had hired a large number of men to cut and haul the timber from the premises and that they should be compelled to disclose the names of the persons so hired, amount paid, number and kind or kinds of timbers cut and hauled.

After testimony had been taken and Plaintiff had rested her case, and, on July 17, 1941, Plaintiff filed another amendment to her complaint. This amendment further alleged that Defendants knowingly and wilfully had cut, felled, destroyed or actually carried away, or caused to be taken from said lands, a large number of black walnut, white, black and yellow ash, and other hardwood trees standing and growing on Plaintiff's said lands, without permission from Plaintiff, and in violation of Section 1, Paragraph 5 of Chapter 136 of the Illinois Revised Statutes, being the same trees and timbers mentioned in the Complaint, whereby Defendants forfeited and became liable to pay Plaintiff at least $3.00 for each tree and sapling so wrongfully and unlawfully cut, felled and destroyed, and prayed judgment for $45,000.00.

The Statute last above referred to, commonly called "Timber Statute" was repealed on July 15, 1941, with a clause providing

that the repeal should not affect any suits pending and rights existing, at the time the Act took effect.

Plaintiff claims the judgment rendered is inadequate, in that, she is entitled to $3.00 to $8.00 per tree under said penalty statute. Defendant filed two pleas of the Statutes of Limitations, one the two year and the other the five year limitations.

The question arises whether the two or five year Statutes of Limitations bar recovery under this "Timber Statute". The right of recovery of $3.00 or $8.00 per tree arises by virtue of this Statute. As a general rule, an action to enforce liability based on a Statute, is governed by the five year Statutes of Limitations; Lyons v. County of Morgan, 313 Ill. App., 296, 298; Parmalee v. Price, 208 Ill. 544, 559; People ex rel. Powles vs. County of Alexander, 310 Ill. App. 602, 604. But the case last above cited held that said 5 year Statutes of Limitations applies, if the action is a "Civil Action not otherwise provided for," within the meaning of Section 14 of the Limitations Act, Chap. 83, Sec. 14, Par. 15, Illinois Revised Statutes entitled, Personal Actions. This Section 14 provides among other things that, "Actions for *** a statutory penalty *** shall be commenced within two years after the cause of action accrued." It has been held by a number of decisions of courts of review of this State, that an action to recover $3.00 or $8.00 per tree under this "Timber Statute" is an action to recover a penalty. Cushman v. Oliver, 81 Ill. Sup. 444; Whitecraft v. Vanderver, 12 Ill. Sup. 235; Watkins v. Gale, 13 Ill. 152; Satterfield v. Western Union Telegraph Company, 23 Ill. App. 446; Edwards v. Hill, 11 Ill. Sup. 17 (22). Therefore, the two year Statutes of Limitations would apply as to the amendments of July 21, 1938, and July 17, 1941, unless prevented by some other law.

The original Complaint was filed within one year after the cause of action accrued. Before Section 46 of the Illinois Civil Practice Act came into effect, we believe the Statutes of Limita-

tions would have barred recovery under this "Timber Statute". Before this Section 46 was passed, a declaration which stated no cause of action because of omission of some material allegation, could not be cured by an amendment after the Statutes of Limitations had become a bar, but since the enactment of this Section 46, an amendment can be made stating a cause of action, where one was not theretofore stated. Metropolitan Trust Company v. Bowman Dairy Company, 369 Ill. Sup. 222, 229-230. Before this Section 46 was passed, a "new cause of action" could not be added by amendment after the Statutes of Limitations had run.

The Supreme Court of Illinois, in the case of Metropolitan Trust Company, et al. vs. Bowman Dairy Company, 369 Illinois Supreme Reports, page 222, discusses in detail the former Practice Act and changes provided by Section 46 of the Illinois Civil Practice Act. The Court stated at page 229, "Section 46 permits changing the cause of action or adding new causes of action *** Section 46 permits such change as may enable him to sustain the claim intended to be brought *** While these changes do not deal with the subject of limitations, they eliminate the former requirement that the original pleading must state a cause of action and that an amendment must set up the same cause of action. *** The requirement for substantial identity was omitted from Paragraph 2 of Section 46. The sole requirement of that paragraph is that the cause of action set up in the amendment grew out of the same transaction or occurrence set up in the original pleading. Briefly summarized, Section 46 permits any amendment of a pleading, filed in apt time, after the time limited for commencing suit to set up a cause of action on any claim which was intended to be brought by the original pleading, provided, only, that it grew out of the same transaction or occurrence, and it is not necessary that the original pleading technically state a cause of action, or that a cause of action set out in the amendment be substantially the same as any cause of action stated in the original pleading. The term 'same transaction

or occurrence', so used in the Statute, means the same suit." The "transaction or occurrence" in the instant case was the unlawful cutting, removing and conversion of ties and props from Plaintiff's lands, without her authority. That was set up in the Original Complaint. The claim for punitive and exemplary damages by the amendment filed July 21, 1938, and for a penalty of $3.00 to $8.00 per tree by amendment of July 17, 1941, were designations of these acts as wrongful, illegal and wilful, and permitting of exemplary and punitive damages and penalty value per tree as provided by said "Timber Statute". We think the allegations in this "same suit" were in regard to the "same transaction and occurrence". Under the provisions of the Civil Practice Act, the amendments were permissible and the Statutes of Limitations pleaded were no bars to the charges alleged in these amendments.

The trial court did not err in refusing to hold that the amendments were barred by the Statutes of Limitations, nor that the repeal of the "Timber Statute" prevented any recovery thereunder in this case.

The court refused to allow damages under the amendment setting up this "Timber Statute". We are of the opinion that the proof in this case does not show liability under this "Timber Statute". The preponderance of the evidence shows that Bittle had arranged to sell ties and props to Appellee. Bittle secured Nance to cut the timber for him. Bittle took Nance to interview the agent of Appellee. Nance employed his own men to cut the trees and to make them into ties and props. In the course of the testimony, it appears that Bittle took Nance with him when he talked with an agent of Appellee in reference to purchasing the ties and props and for specifications for cutting same. In the course of the earlier testimony, Nance testified that he received "not nothing from Bittle"; that the money and checks for his labor and with which he paid his men was paid him by Appellee. The evidence further shows that Appellee's agents inspected the growing timber on the

land, and the ties and props when cut and stacked for hauling; that they gave Nance specifications as to how the props and ties should be cut, and furnished Nance twice a month with statements of the number of ties cut, and that the checks given Nance bore in print that they were for wages. Appellee's agent hauled the ties and props from the place where they were piled by Bittle.

Plaintiff-Appellant argues most earnestly, that on such proof, judgment under the "Timber Statute" should be awarded Plaintiff.

There are numerous decisions by courts of review of this State holding that one who wilfully goes upon another's land and cuts trees, by himself or his agents, is liable under this "Timber Statute" to the owner for a penalty of $3.00 to $8.00 per tree. The courts uniformly hold that in such case, the actual cutting and taking of the trees of another, by himself or by an agent is wilful, and that the intention is no less wilful and is not an excuse because the person so cutting and taking, or causing by his agent the cutting and taking of trees of another, did not actually know who was the real owner of the land. The law requires such person to secure and know the information of ownership which appear on the records of a given county. State Bank of Waterloo vs. Potosi Tie & Lumber Co., 299 Ill. App. 524.

When further testimony was taken in this case, an explanation was made that Appellee actually paid said Nance for labor of himself, and which he used for payment of his men for cutting said trees and fabricating them into ties and props, and that said payments were made on behalf of Bittle, from whom, alone, Appellee bought said ties and props. The explanation shown by the preponderance of the evidence was, that by a special arrangement between Bittle and Nance, Appellee was asked, on behalf of Bittle to pay Nance direct a pro rata amount of the purchase price for the labor of Nance and his men, and to pay the balance of the purchase price direct to Bittle. Such fact of payment and reason for it under

such arrangement, was testified to positively by defendants, Bittle, Nance and Hoffman, and by Hasenjaeger an employee in Appellee's office. Several haulers and workers testified that Nance paid them for their services. No witness testified that Appellee hired Nance or that Nance was an agent or employee of Appellee. We think the preponderance of the evidence is that Appellee did not cut any of these trees or remove them from Plaintiff's land. It follows, we think, that the proof failed to show any liability under the amendment based upon this "Timber Statute". It follows that the trial court did not err in refusing to assess the penalty amounts provided by this "Timber Statute".

The Special Master saw and heard the witnesses testify, and the Chancellor affirmed his finding. While the findings of the Master in Chancery are not binding, they have an advisory weight. We have carefully read over the conflicting testimony in the voluminous record, and we believe that it shows the purchase of the ties and props by Appellee from Bittle, and that Nance was not an agent or servant of Appellee, that Nance was not employed by Appellee, and that Appellee purchased the ties and props from the Defendant, Bittle. Appellee purchased ties and props which were made from trees belonging to Plaintiff, without her authority or knowledge. Bittle and his relatives testified at great length that Plaintiff gave Bittle authority to cut and sell these hardwood trees. Much of the testimony of Bittle, and much of the testimony of such of his witnesses, was not only positively denied by Plaintiff, but was impeached by other witnesses of Plaintiff, and by facts, conditions and circumstances, which, to us, renders Bittle's claim of authority to cut and sell, wholly unworthy of belief. To say the least, the evidence was very conflicting on that point. We believe the evidence amply supports Plaintiff's contention that her hardwood trees were cut and sold without her authority and knowledge.

It has been held that it is the duty of a purchaser of land to learn who is the actual owner of it, by examination of the title that may be shown of record, and that if a person does not, and buys from another who is not the owner, and places improvements upon the land, that he does so at his own peril. Clark v. Leavitt 335 Ill. 184, 190-191; Blake vs. Blake, 260 Ill. 70, 75. Like determination is imposed upon one who, by himself or his agent, goes upon land and cuts and removes trees belonging to another. State Bank of Waterloo vs. Potosi Tie & Lumber Co. 299 Ill. App. 524. Appellee failed to search the records, and admits that such records were not searched by him. Since Appellee purchased from another without authority, Plaintiff's property, the trial court did not err in determining liability against Appellee in favor of Appellant and entering judgment against Appellee in favor of Appellant.

The remaining question is the correct amount of damages to which Plaintiff is entitled. Appellant contends that the amount which Bittle paid for hauling ties and props, should be deducted. We are not furnished with authorities of courts of review as to the correct measure of damages against a buyer from one who has wrongfully cut trees and made them into ties and props, where the buyer takes possession of same from the place where the ties and props are collected, by the wrong buyer who cut same. Several cases are cited concerning the measure of damages for wrongfully taking of coal, ice or timber from the lands of others. Piper v. Connelly 108 Ill. 646. We believe the rule in Donovan v. Consolidated coal Company, 187 Ill. 28, and The Chicago South Branch Dock Company v. Dunlap, 32 Ill. 207, 211, seem to lay down the correct rule against the one who actually goes on the land and takes timber or the coal out of the ground and brings it to the surface.

But in the case at bar, the trees so cut and fabricated into ties and props were hauled by other persons than the Appellee to the place where they were stacked, from which Appellee took

these ties and props, and thereby wrongfully converted them to its own use. The conversion occurred at the place where Appellee took possession of the ties and props. Had the ties been left there by Appellee, Appellant, who was the owner of them, could have taken possession of them. Appellee seeks credit at so much a tie against Appellant-Plaintiff for payments made by Bittle to Nance. We do not believe that such contention of Appellee is sound. The question of damages is not that Appellee paid a wrong doer for the props and ties, nor that some third person was paid by a wrong doer to cut and haul Plaintiff's ties and props from her land. But the question is what was the value of the ties and props of Plaintiff when they were converted wrongfully by Appellee.

The report of the Master found that the value of props at this place where received by Appellee was 6½ cents each, and the ties 8½ cents each, and the trial court entered judgment for that amount. The evidence of the Defendant as to the values of the ties piled on the road at Plaintiff's farm was likewise 6½ cents each for the props, and 8½ cents each for the ties.

Not only the preponderance of the evidence, but apparently undisputed evidence supports the amount of the judgment entered by the trial court in the sum of $1550.58 and costs against Appellee, in favor of the Plaintiff-Appellant. That judgment should be and hereby is affirmed.

JUDGMENT AFFIRMED.

42341

321 I.A. 363

ROBERT G. TOMASC,
Appellee,
v.
FRED SERTAK,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

A

Det
-3-44

On Rehearing.

3 253 299

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for personal injuries and property damage, in which the court without a jury found for plaintiff and entered judgment for personal injuries in the amount of $653 and for property damage, $970. Defendant appeals.

Plaintiff was driving northeast on Ogden Boulevard, Chicago, and defendant, with his wife and children was driving southwest. It was early morning September 10, 1933, and the evidence is that both were driving between 20 and 25 miles per hour, near Fairfield avenue when the cars collided. Plaintiff, driving down the center of the street, says defendant swerved from the center line to the south and he swerved north to avoid the collision, but that defendant then swung straight west and caused the accident. Defendant says that plaintiff when about five feet away swung north right in front of defendant's car near the north curb and defendant trying to avoid the collision, caused his car to climb the north curb, breaking an axle. Both cars were damaged and plaintiff and defendant's wife were injured. She was dismissed from this action.

Defendant contends that the Municipal Court had no jurisdiction to entertain the suit since it exceeded that court's tort jurisdiction; that estoppel by verdict operated against plaintiff to bar his action and that damages for plaintiff for personal

42341

ROBERT S. TOMAKO,

Appellee,

v.

FRED SCHYAR,

Appellant.

Mr. Justice [illegible] delivered the opinion of the court:

This is an action for personal injuries and property damage, in which the court without a jury found [illegible] entered judgment for personal injuries [illegible] and for property damage, [illegible].

Plaintiff was driving northbound on Damen avenue, Chicago, and defendant, with his wife [illegible] driving southwest. It was early morning [illegible], and the evidence is that both were driving between 30 and 35 miles per hour, near Fairfield avenue when the cars collided. Plaintiff, driving down the center of the street, says defendant at another [illegible] center line to the south and he swerved north to avoid the collision, but that defendant then swung straight west and caused the collision. Defendant says this plaintiff when about [illegible] feet away swung north right in front of defendant's car and then [illegible] north curb and defendant trying to avoid the collision, swerved his car to [illegible] the north curb, breaking an axle. Both [illegible] plaintiff and defendant's wife were injured. [illegible] this action.

Defendant contends that [illegible] was no jurisdiction to entertain the suit since [illegible] lack of jurisdiction; that [illegible] to bar his action and that [illegible] for personal

injuries cannot be sustained on the evidence here. Leave was given the Municipal Court to file a brief as amicus curiae on the question of its jurisdiction.

Plaintiff's original statement of claim, consisting of four paragraphs, charged his due care, defendant's negligence and plaintiff's resulting injuries and property damage. In the fourth paragraph he charged wilful and wanton conduct, his injuries and property damage in the amount of $5,000. Defendant moved to dismiss on jurisdictional grounds and plaintiff was given leave to file three successive amended statements of claim. The verdict and judgment were on the third amended statement of claim, in paragraph 2 of which he limits his claim for personal injuries to $1,000 and in paragraph 3 his property damage to $1,200. Defendant's motion to strike the third amended statement of claim was denied and he was ordered to plead. He denied the material allegations of fact and set up the defense of estoppel. No reply was filed, but since defendant introduced evidence in support of the affirmative defense, he waived requirement of a reply.

It is defendant's position that the court had no jurisdiction to entertain the original statement of claim because the ad damnum was $5,000 and in excess of the court's tort jurisdiction. The original statement of claim filed in 1934 properly combined the distinct claims for personal injuries and damages to plaintiff's car, (Clancey v. McBride, 338 Ill. 35; Municipal Court Rule 54, 1934); and the court's jurisdiction was not limited to $1,000 in the property damage claim (Nierodzinski v. City of Chicago, 284 Ill. App. 598; Chap. 37, Pars. 374, 375 Ill. Rev. Stat. 1941). There is no merit to defendant's contention. The third amended statement of claim separated the claims into a fourth class claim for personal injuries and a first class

injuries cannot be [illegible] the Municipal Court to file a [illegible] of its jurisdiction.

Plaintiff's petition [illegible] paragraphs, charged his [illegible] tiff's resulting injuries and [illegible] be observed with [illegible] damage in the amount of [illegible] additional grounds [illegible] successive amended statements of claim. [illegible] were on the third amended statement of claim, [illegible] be limits his claim [illegible] 2 his property [illegible] third amended statement of claim was denied [illegible] He denied an the [illegible] of actions. [illegible] evidence in support [illegible] of a reply.

It is defendant's [illegible] to entertain the original [illegible] $5,000 and in excess of the court's [illegible] statement of claim [illegible] for personal injuries [illegible] McBride, 275 Ill. 39; [illegible] jurisdiction was not [illegible] (Hierzebinski v. City of Chicago, [illegible] 274, 275 Ill. App. [illegible] contention. The third amended [illegible] into a fourth class claim for personal injuries [illegible]

claim for property damage, neither of which exceeded the court's jurisdiction; and the judgment upon each was within the jurisdiction and separate judgment for each claim was proper under Municipal Court Rule No. 75 in effect when amendment was made. The separate counts were not carefully drawn, but no objection other than to jurisdiction was made in the trial court.

Mrs. Sestak in August, 1934, before the instant suit was begun, sued plaintiff Tomaso in the Municipal Court for personal injuries and Tomaso filed a counterclaim. Judgment was for her for $100 on November 1, 1935. It is this fact upon which defendant's affirmative defense is based. To sustain the defense, defendant, without objection, introduced copies of the pleadings in his wife's action. In her statement of claim she alleged that she was a guest in the exercise of due care in the automobile in which the driver was not her agent or servant; that Tomaso negligently "turned his motor vehicle in a northerly direction suddenly and without warning" in front of the motor vehicle in which plaintiff was riding and, as a result of which, there was a collision which caused her injury. Tomaso's affidavit of merits denied Mrs. Sestak was a guest and that she exercised due care; stated that the driver was her agent or servant; and denied ownership of the car and the negligence charged. In his counterclaim he charged that Mrs. Sestak by her agent, negligently operated the automobile which collided with his, as a result of which he was injured.

It appears from the record that at the trial of the instant case the file in the other proceeding was not available in time for introduction in defense and plaintiff's counsel agreed to the use of copies, whereupon defendant's counsel read from Municipal Court record of tort cases the following entry referring to his wife's action:

> "Trial by jury; motion plaintiff to strike malice count sustained. Verdict on plaintiff's statement of claim and defendant's counterclaim. Finding, defendant Robert S. Tomaso

> guilty as charged; damages one hundred dollars. One hundred dollars in tort. Judgment on verdict versus defendant Robert S. Tomasc One Hundred Dollars and costs."

Defendant's counsel then advised the court that the counterclaim had been dismissed and later said that the jury had found the issues for the plaintiff and against the defendant "and found against the counterclaim." Defendant's affirmative defense referred to by counsel and court at the trial as a "plea of res judicata", was "overruled."

Defendant seeks to have the doctrine of estoppel apply in his favor to defeat plaintiff's claim. The basis presented for the doctrine is the prior personal injury action in the Municipal Court between defendant's wife and Tomasc in which he claims Tomasc's negligence was established rendering the latter's recovery here impossible. There was no showing made by defendant that he was a party or privy to the prior suit, (City of Chicago v. Cartridge, 248 Ill. 442); nor that the issues were the same; nor that there was any relationship between him and his wife under which the prior verdict would aid him here. F. J. Martin Certare Co. v. Dempster Bros. 311 Ill. App. 70 and Emery v. Fowler, 39 Me. 326. He had the burden of doing so. City of Geneseo v. Illinois Northern Utilities Co. 378 Ill. 506.

Finally, defendant contends that the damages allowed for plaintiff's injury is excessive. The judgment was for $53. Plaintiff was rendered unconscious in the collision and was taken to Mount Sinai Hospital, his head shaved above a head wound which was later sewed with four stitches; was in bed for three days; had a fourth finger broken and placed in a splint; was away from work for two weeks, although he received pay during that period; was treated for these injuries and for his back and knee by a doctor for about a

guilty as charged; [illegible] on [illegible] and [illegible] dollars in [illegible]
Robert [illegible]. Tyson the [illegible] [illegible]."

Defendant's counsel then [illegible] the [illegible]
had been dismissed and [illegible]
for the plaintiff and against [illegible]
counterclaim." Defendant's [illegible]
counsel and bower of the [illegible] "[illegible]
"overruled."

Defendant seems to have [illegible]
his favor to defeat plaintiff's claim. [illegible]
doctrine is the [illegible]
between defendant's wife and [illegible]
negligence was [illegible]
impossible. There was no [illegible]
party or privy to the [illegible]
246 Ill. 442); nor that the [illegible]
was any relationship between [illegible]
verdict would [illegible]
Bros. 311 Ill. 490 and [illegible]
burden of doing so. [illegible]
Co. 378 Ill. 306.

Finally, defendant contends [illegible]
plaintiff's injury is excessive. [illegible]
was rendered unconscious in the [illegible]
Final Hospital, his [illegible]
sewed with four stitches; was in [illegible]
finger broken and placed in a splint; [illegible]
weeks, although he received [illegible]
these injuries and for his [illegible]

month. His doctor bill amounted to only $53, but we cannot say that the allowance was excessive. See injuries of Flynn in Crane v. Railway Express Agency, Inc., 291 Ill. App. 329, pp. 351, 352 and 353.

For the reasons given the judgments of the Municipal Court are affirmed.

JUDGMENTS AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

GEN. NO. 9905 Abstract AGENDA NO. 8

321 I.A. 264

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1943

Henning A. Hanson, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT OF
Simon Blatt, Appellant.	)	IROQUOIS COUNTY.

447
270

DOVE, P.J.:

Appellee recovered a judgment against appellant in the circuit court of Iroquois County for $4000.00 on account of injuries arising out of an automobile accident on State Highway 49 about 12 miles south of the city of Kankakee, and the cause is here by an appeal from the judgment.

The accident occurred on January 1, 1942, at about 2 o'clock P.M. The highway has a concrete pavement 18 feet wide. It had been raining and was misty, and the pavement was wet. Appellee was driving south in his new Studebaker sedan and appellant was driving his Buick car in a northerly direction. Each of the two men was accompanied by his wife, and these four were the only witnesses who testified concerning the accident. The testimony shows that at all times appellee's car was on its own proper side of the highway. There is a curve to the west in the pavement about 300 to 400 feet south of where the accident occurred.

GEN. NO. 8608

IN THE

APPELLATE DIVISION

OF THE DISTRICT COURT

OF THE [illegible]

Henning A. Hanson,

Appellee,

v.

Simon Blatt,

Defendant.

OPINION:

Appellee recovered judgment against [illegible] in the district court of Ingomola County for [illegible] injuries received while out of an automobile accident [illegible] south of the city of [illegible]. [illegible] from the judgment.

The accident occurred on [illegible] P.M. The highway has a concrete [illegible] running and was [illegible], and the [illegible] ing south in the [illegible] Buick car in a northerly direction. [illegible] panied by his wife. [illegible] fied concerning the accident. [illegible] appellee's car was on its [illegible] a curve to the west in the highway [illegible] where the accident occurred.

Appellee testified that immediately prior to the collision his car was travelling about 40 miles per hour; that about 400 feet to the south, appellant's car passed another car which was also going north, and as he came behind it he straightened out into the highway and his car started to skid across the road, and the back end swung over onto appellee's side of the road; that as appellant's car began to skid, he, the witness, slowed down and drove to the west as far as he could, and at the time of the collision a portion of his car was off the west side of the road, not more than two feet from the ditch; that appellant's car swung to the west and the left front of the witness' car struck the rear end of appellant's car, which was practically across the south bound lane; and that when his wife got out of the car she slipped down in the ditch. His wife corroborated his testimony in detail.

Appellant testified that he passed the car going in the same direction shortly after the Clifton corner, the distance of which from the scene of the accident is not shown by any testimony in the abstract; that he was travelling 50 to 60 miles per hour at that time, and slowed down for the curve and the accident happened about 200 feet north of the curve; that he skidded 100 feet, and that his car started to skid, about 300 or 400 feet from appellee's car, which was the first time he saw the latter; that the pavement was wet and in the particular spot there was mud on it, which he did not see as he approached it; that immediately before his car began to skid he was travelling 35 to 40 miles per hour and had his car under control at that time; that he did not step on the accelerator or brake, and was not conscious of doing anything to cause the car to skid, and did not know why it did so, except that the pavement was slippery on account of the mud and dirt on it; that appellee's car was still on the highway, and did

Appellee testified that immediately prior to the collision his car was travelling about 40 miles per hour; that about 400 feet to the south, appellant's car passed another car which was also going north, and as he came behind it he straightened out into the highway and his car started to skid across the road, and the back end swung over onto appellee's side of the road; that as appellant's car began to skid, he, the witness, slowed down and drove to the west as far as he could, and at the time of the collision a portion of his car was off the west side of the road, not more than two feet from the ditch; that appellant's car swung to the west and the left front of the witness' car struck the rear end of appellant's car, which was practically across the south bound lane; and that when his wife got out of the car she slipped down in the ditch. His wife corroborated his testimony in detail.

Appellant testified that he passed the car going in the same direction shortly after the Gifton corner, the distance of which from the scene of the accident is not shown by any testimony in the abstract; that he was travelling 35 to 30 miles per hour at that time, and slowed down for the curve and the accident happened about 200 feet north of the curve; that he skidded 100 feet, and that his car started to skid, about 300 or 400 feet from appellee's car. Did you the first time he saw the latter; that the pavement was wet and in the particular spot there was mud on it, which he did not see as he approached it; that immediately before his car began to skid he was travelling 35 to 40 miles per hour; that he was under control at that time; that he did not step on the accelerator or brake, and was not conscious of doing anything to cause the car to skid, and did not know why it did so, except that the pavement was slippery on account of the mud and dirt on it; that appellee's car was still on the highway, and his

not pull "off the shoulder". This does not contradict appellee's testimony that he pulled over onto the shoulder. He further testified that he did not see appellee's car when he passed the other car. His wife testified that she could not tell how the accident happened, because when the car began to skid she was knocked against the cowl and became unconscious, and was picked up out of the ditch. Appellant was thrown out of his car, which continued down the highway and went over into the ditch on the west side of the pavement. Appellee's car was wrecked and sold for junk. The cost of repairing appellant's car was $320.00. Appellee suffered a comminuted fracture of the left femur, was in the hospital for ten weeks, at home in bed two additional weeks, used a walker for a month, and crutches for two weeks, and at the time of the trial used a cane, with a permanent disability and 70% normal function of the limb, and a shortening of two centimeters. The injuries to the others involved in the accident were minor.

The claim that the court erred in refusing to direct a verdict for appellant at the close of the testimony for appellee and at the close of all the testimony is so clearly without merit as to need little comment. The long established rule is that the trial court is not permitted to direct a verdict for the defendant where there is any evidence fairly tending to prove the allegations of the plaintiff's complaint. A motion for a directed verdict presents the question of law as to whether, when all the evidence is considered together with all reasonable inferences therefrom in its aspect most favorable to the plaintiff, there is a total failure to prove one or more of the necessary elements of the case. Foreman-State Trust & Savings Bank v. Demeter, 347 Ill. 72; Hunter v. Troup, 315 Ill. 293. The same rule applies to a motion for judgment notwithstanding the verdict. Carrell v M.&C. R.R. Co., 384 Ill. 599; Walaite v. Chicago, Rock Island and Pacific Railway Co.,

not pull "off the handle". [illegible]

testimony that he pulled over [illegible]

fied that he did not see appellee [illegible]

car. His wife testified that [illegible]

happened, because when the car [illegible]

the cowl and see the unconscious [illegible]

Appellant was thrown out of his [illegible]

way and went over into the [illegible]

Appellee's car was wrecked and [illegible]

ing appellant's car was [illegible]

fracture of the left femur, [illegible]

in bed two addition[illegible]

for two weeks, and at the time [illegible]

ment disability and 70% normal [illegible]

ing of two centimeters. The injuries to the [illegible]

accident were minor.

The claim that the court [illegible]

for appellant at the close of his [illegible]

close of all the testimony [illegible]

little comment. The long [illegible]

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is any evidence fairly tending [illegible]

tiff's complaint. A motion for [illegible]

tion of law or to [illegible]

gether with all reasonable inferences [illegible]

favorable to the plaintiff, there is [illegible]

or more of the necessary elements [illegible]

& Savings Bank v. Dempster, 247 Ill. [illegible]

The same rule applies to a motion for [illegible]

verdict. Wallace v. Chicago, [illegible]

Goodrich v Sprague, 376 Ill. 80.

376 Ill. 59; The testimony clearly shows that appellee was in the exercise of due care and caution for his own safety, and tends to show that appellant came out of a curve at a high rate of speed on a slippery pavement and skidded across the pavement into the path of appellee's car, all within a distance of 400 feet.

Appellant's claim that the testimony of appellee that as appellant came behind the other car he straightened out into the highway, means that appellant's car returned to the proper side of the road, does not bear that construction or justify such an implication. Under the testimony in this case the trial court did not err in refusing to direct a verdict for appellant, or in refusing to enter judgment notwithstanding the verdict.

The claim that the judgment is against the manifest weight of the evidence is likewise without any merit. The complaint charges excessive speed, and negligently and without warning driving across the highway in front of appellee's car. The testimony of appellant's wife shows the speed was such that as the car began to skid, she was thrown against the cowl with such force that she was knocked unconscious. While appellant testified he passed the other car going in the same direction shortly after the Clifton corner, the abstract does not show how far from the accident that corner is located, and appellee's testimony that the passing of the other car was about 400 feet from his car is uncontradicted. Appellant admits that he was travelling 50 to 60 miles per hour at the time of passing the other car. The jury believed appellee's version of the occurrence and were fully justified in so doing. As to appellant's claim that he had his car under control when he began to skid, he apparently forgets ~~his testimony that~~ his testimony that his car and appellee's car were about 300 to 400 feet apart when he began to skid, and that he could stop his car within 400 feet if it was under control.

Stewart v. Schlappenberg 82 Ore.

378 Ill. 301. The testimony [illegible]

exercise of due care and caution [illegible]

show that appellant came [illegible]

a slippery pavement and [illegible]

of sufficient [illegible] of the court.

Appellant's claim that the [illegible]

pellant came behind the other [illegible]

way, means that appellant [illegible]

road, does not bear that [illegible]

Under the testimony in this [illegible]

ing to direct a verdict for [illegible]

ment notwithstanding the verdict.

The claim that the judgment [illegible]

the evidence is likewise without [illegible]

excessive speed, and negligently [illegible]

the highway in front of [illegible]

wife above the place [illegible]

thrown against the cowl which [illegible]

motors. While [illegible]

the same direction [illegible]

not show how far from [illegible]

ee's testimony that [illegible]

from his car is [illegible]

ing so to [illegible]

the jury believed [illegible]

in so doing. As [illegible]

trol when he began to [illegible]

his testimony that [illegible]

feet apart when he began [illegible]

within six feet [illegible]

Appellant filed a counter claim against appellee, charging that the occurrence was the result of appellee's negligence and the jury returned a verdict of not guilty on the counter claim. The cause was not tried on the theory of an unavoidable accident and the issues were not formed on any such theory and appellant's claim that it was is obviously an afterthought. In our opinion the testimony shows that appellant was guilty of the negligence charged, and the verdict and judgment are not against the manufest weight of the evidence.

Appellant also complains of the refusal to give his 3rd and 7th tendered instructions to the effect that if plaintiff's injury was the result of a mere accident and not caused by the negligence of either the defendant or the plaintiff, the plaintiff cannot recover. There is no evidence which shows that appellee was injured through accident alone, and as we have pointed out, there was no issue of a mere accident in the pleadings, and the cause was not tried on that theory. There was no error in refusing the instructions. Streeter v. Humrichous, 357 Ill. 234; Hughes v. Medendorp, 294. Ill. App. 424.

Appellant's 5th tendered instruction directed a verdict and singled out only appellant's theory of a skidding without negligence on his part, and was properly refused. Peters v. Madigan, 262 Ill. App. 417, 426; Vaughn v. Director General of Railroads, 218 Ill. App. 595, 601.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Judgment affirmed.

Appellant filed a counter-affidavit [illegible] that the occurrence was the result of [illegible] jury returned a verdict of not guilty [illegible] cause was not tried on the theory of [illegible] issues were not formed on any such theory [illegible] was is obviously an afterthought. [illegible] that appellant was guilty of the [illegible] and judgment was not against the [illegible].

Appellant has complained of the refusal [illegible] tendered instructions to the effect that if [illegible] the result of a mere accident [illegible] the defendant or the jailkeeper, [illegible] no evidence which [illegible] and as we have pointed out, there [illegible] the pleadings, and the cause was not tried on that theory. [illegible] no error in refusing the instructions. [illegible] 324; Hughes v. Hedenberg, [illegible].

Appellant's [illegible] tendered instruction [illegible] out only appellant's theory of [illegible] and was properly refused. [illegible] Vaughn v. Director General of Railroads, [illegible].

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Affirmed. [illegible]

GENERAL NO. 9906 Abstract AGENDA NO. 32

321 I.A. 364

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1943.

Elmhurst Lumber & Coal Company, vs. John H. Alke and Anna Alke, Appellants, Sigismondo Sinibaldi, Intervening Petitioner, Appellee. Elmhurst Lumber & Coal Company, vs. John H. Alke and Anna Alke, Appellants Paul Grusecki, Intervening Petitioner, Appellee.	APPEAL FROM CIRCUIT COURT OF DU PAGE COUNTY.

DOVE, P.J.:-

This cause is here by an appeal from a decree of the circuit court of DuPage County, foreclosing two mechanics' liens on premises owned by appellants, in favor of two sub-contractors, each of whom

GENERAL No. 9908

Kimbrel Lumber & Coal Company,

Vs.

John H. Mike and Anna Mike,

Stipulation Similiar, Interveening Petitioner,

Kimbrel Lumber & Coal Company,

Vs.

John H. Mike and Anna Mike,

Paul Orescovi, Intervening Petitioner,

DEVIN, P.J.:-

This cause is here by [illegible] court of Bungo County, [illegible] owned by appellees, in [illegible]

separately intervened in a different one of two lien foreclosure suits instituted by the Elmhurst Lumber & Coal Company, and which were later consolidated in the trial court.

The record discloses that during the latter part of the year 1928 A. P. Acton contracted with appellants to construct a dwelling house on their premises, and entered into subcontracts with appellees for portions of the work, as hereinafter mentioned. The following year Acton abandoned his contract without completing the building. Neither of the appellees has ever been paid anything for the labor or material furnished under his subcontract. The first of the two original suits was filed on August 10, 1929, against appellants, as owners of the premises, A. P. Acton, as general contractor, and appellee Paul Grusecki, as subcontractor, on account of materials allegedly furnished Grusecki for the dwelling. Grusecki filed an answer and intervening petition, claiming a mechanic's lien by virtue of a contract on December 5, 1928, between him and Acton, and under which he furnished material and labor on the dwelling in constructing footings, foundation, cement floor in basement, brick fire place and chimney, cement steps in front entrance with balusters and cement sidewalks, to the amount, including agreed extras, of $882.00 and that he completed his contract on August 28, 1929. He filed a claim for lien on October 23, 1929.

The second suit was filed on September 19, 1929, to foreclose a lien for materials furnished Acton for the building, to the amount of $1263.29. Appellee Sigismondo Sinibaldi filed an intervening petition in this latter suit, on February 19, 1930, alleging that he was employed by Acton "to perform work and labor and furnish the materials for laying, installing and connecting sewers for the improvement of the premises described in said bill of complaint between the 11th day of December, 1928, and the 26th day of December, 1929, and that during

separately intervened in a different one of the lien foreclosure suits instituted by the Klamath Lumber & Coal Company, and which were later consolidated in the trial court.

The record discloses that during the latter part of the year 1928 A. P. Aston contracted with appellees to construct a building on their premises, and entered into subcontracts with appellees for portions of the work, as mentioned above. The following year Aston abandoned his contract without completing the building. Neither of the appellees has ever been paid anything for the labor or material furnished under his subcontracts. The filing of the two original suits was filed on August 10, 1929, against Orell Ritz, as owners of the premises, A. P. Aston, as general contractor, and appellee Paul Grassecki, as subcontractor, on account of materials allegedly furnished Grassecki for the dwelling. Grassecki filed an answer and intervening petition, claiming a mechanic's lien by virtue of a contract on December 8, 1928, between him and Aston and under which he furnished material and labor on the dwelling in constructing footings, foundation, cement floor in basement, brick fire place and chimney, cement steps in front entrance, lath plaster, cement sidewalks, to the amount, including [illegible], [illegible] and that he completed his contract on August 26, 1929. He filed a claim for lien on October 26, 1929.

The second suit was filed on September 14, 1929, to foreclose a lien for materials furnished Aston for the building, to the amount of $1653.29. Appellee Sigismund Sinkfield filed an intervening petition in this latter suit, on February 13, 1930, claiming that he was employed by Aston to perform work and labor and furnish material for laying, installing and connecting pipes for [illegible] on the premises described in said bill of complaint [illegible] day of December, 1928, and the 28th day of December, 1928, [illegible] amount

said period of time your petitioner furnished all of the sewer pipe, * * * and all the work and labor required for laying, installing and connecting said sewers with the main outlet sewers in said Village", to the amount of $110.70; and further alleging the filing of a claim for lien within sixty days after December 26, 1929.

Appellants answered the original bills of complaint, denying the material allegations thereof, but the abstract does not show that either of the intervening petitions was answered. On January 11, 1932, each of the causes was stricken from the docket, with leave to reinstate, upon proper showing under Rule 10 of the court, and were a week later, on January 18, 1932, reinstated. The causes were referred to the master on September 12, 1932, and on February 5, 1940, were dismissed on motion of the original complainant, without notice to either of the intervening petitioners and without costs. The orders of dismissal were vacated on March 8, 1940, the intervening petitioners were ordered to present proof of their claims within thirty days, and the causes were referred to a special commissioner. On March 6, 1942, on motion of John H. Alke, the complainant and the intervening petitioners were ordered to present proofs within two weeks, or otherwise the causes would be dismissed. The causes were afterward continued from time to time, the special commissioner's report was filed on June 18, 1942, the causes were thereafter consolidated, and the decree appealed from was entered on December 21, 1942. The amount of the liens of Grusecki and Sinibaldi were fixed at the sums claimed, $882.00 and $110.70, respectively, with interest at 5% per annum from August 28, 1929, and December 26,1929, respectively, up to the date of the special commissioner's report, making a total amount of $1442.81 in the Grusecki case, and $179.51 in the Sinibaldi case. The decree further provides for interest from its date at the rate of 5% per annum.

said period of time [illegible]

pipe, " " " and all the [illegible]

stalling and connecting [illegible]

in said village, [illegible]

the filing of a claim for [illegible]

26, 1929.

Appellants answered the [illegible]

the material allegations thereof, [illegible]

that either of the intervening petitions [illegible]

11, 1932, each of the owners was [illegible]

leave to return to, upon proper showing [illegible]

and were a week later, on March 19, [illegible]

were referred to the master [illegible]

6, 1940, were dismissed on motion of [illegible]

out notice to either of the intervening petitioners [illegible]

The orders of dismissal were [illegible]

ing petitioners [illegible]

thirty days, and the cause [illegible]

On March 6, 1940, on motion [illegible]

intervening petitioners [illegible]

weeks, or other [illegible]

afterward continued from [illegible]

was filed on June 16, 1941, [illegible]

and the decree [illegible]

amount of the liens of [illegible]

claimed, $888.00 and $110.70, [illegible]

annum from August 22, 1923, [illegible]

the date of the special [illegible]

of $442.81 in the [illegible]

the decree further [illegible]

5% per annum.

Appellants claim that Acton contracted with them to build the house for $5500.00: that when he abandoned the contract, the cost of completing the building in accordance with the original contract would be from $6000.00 to $7000.00, or between $500.00 to $1500.00 more than the original contract price: and that therefore under section 21 of the Liens act, (Ill. Rev. Stat. 1941, chap. 82, par. 21), neither of the appellees is entitled to a lien. The section of the statute invoked provides:

> "In no case, except as hereinafter provided, shall the owner be compelled to pay a greater sum for or on account of the completion of such house, building or other improvement than the price or sum stipulated in said original contract or agreement, unless payment be made to the contractor or to his order, in violation of the rights and interests of the persons intended to be benefited by this act; * * *."

On the taking of the testimony before the special commissioner, when Mr. Alke was asked: "How much did you agree to pay Mr. Acton?", he replied: "Well, we had a loan for $5500.00 we figured that would pay it." Charles Albert Langman, a witness called by appellants, when asked: "What would it cost to complete the building?", answered: "Of course, with the cost of materials now, it would run around six or seven thousand dollars." This is the only testimony on the question. Manifestly, it does not show that the contract price was $5500.00 or that it would cost $6000.00 to $7000.00 to construct the building in 1929. Hence, there is no showing that makes section 21 of the Liens act applicable here, and the contentions of appellants in this respect are without merit.

The claim that Sinibaldi is not entitled to a lien for the further reason that he failed to prove the date of completion of his subcontract is equally untenable. While he testified he could not remember the exact date of completion, he also testified that he started the work on December 11, 1928, and that it was completed within a few days. The witness Langman testified that such work would take about three days, and Mr. Alke testified that he saw the work completed, in the early spring of 1929. Appellants concede the intervening petitioner's right to enforce his lien the same as a

appellants claim that [illegible] contracted with them to build [illegible] house for $8500.00; that when he abandoned the contract, the cost of completing the building in accordance with the original contract would be from $6000.00 to $7000.00, or but [illegible] more than the original costs of price; and that therefore, under section 21 of the Mechanic's Lien Act, (Stat. Rev. C. 1942, chap. [illegible] 21), neither of the appellees is entitled to a lien [illegible] the estate involved provides:

> "In no case, except a contract as provided, shall [illegible] be compelled to pay a greater sum for or on account of the completion of such house, building, or other improvement than the price or sum stipulated in said original contract or agreement, unless payment be made to the contractor or to his order, in total disregard of the rights and interests of the persons entitled to be benefited by this act; * * *."

On the taking of the testimony before the special commissioner, when Mr. Allen was asked: "How much did you agree to pay [illegible]", he replied: "Well, we had a loss for $8500.00. We figured we could pay it." Charles Albert [illegible] [illegible] Commissioner: "Objection, with its [illegible]" [illegible] asked: "What would it cost to complete the building?" [illegible] only testimony on the question. Admittedly, it was not [illegible] the contract price was $8500.00 or [illegible] $7000.00 to substantially the building in 1942. Hence, [illegible] ing that make section 21 of the lien act [illegible] contentions of appellants in this regard [illegible].

The claim that plaintiff is not entitled [illegible] further reason that he failed to prove the [illegible] subcontract is equally untenable. While a witness [illegible] remember the exact date of the completion, he [illegible] started the work on December 11, 1938, [illegible] within a few days. The witness Bongman testified [illegible] would take about three days, and he [illegible] work completed, in the early part of 1939. [illegible] intervening petitioner's right to enforce [illegible]

general contractor. The intervening petition was filed within the two year period prescribed by section 9 of the Liens act, applicable to general contractors. Section 11 of the act, cited by appellants, provides:

"The complaint or petition shall contain a brief statement of the contract or contracts on which it is founded, the date, when made, and when completed, if not completed, why * * *."

This section applies to pleadings and does not purport to apply to proofs. No objection was made in the trial court, and none is urged here, that the intervening petition is deficient in this respect, or that there was any variance between it and the testimony. In Zander Reum Co. v. Congregation B'Nei Moshe, 159 Ill. App. 371, a claim for lien filed within the statutory two years after completion of the work, was upheld, although the only testimony as to the time of completion was that it was done "about the 12th or 13th of September, along in there somewhere; I don't know exactly the date." The proofs were sufficient to establish the lien.

Appellants further contend that the allowance of interest was improper because of the delay in enforcing the liens, and cite cases in which it was held that in equity interest is allowed because of equitable considerations, and is given or withheld as under all the circumstances of the case seems equitable and just. None of the cases cited were controlled by or involved a statute specifically allowing interest, as is the situation in this case. Section 21 of the Lien's act, supra, provides in part: "Every mechanic, workman or other person who shall furnish any materials * * * or perform services or labor for the contractor * * * shall be known under this act as a sub-contractor, and shall have a lien for the value thereof, with interest on such amount from the day the same is due * * *."

general contractor. The intervening [illegible]
the two year period prescribed by section 9 of [illegible]
applicable to general contractors. Section 11 of [illegible]
by appellants, provides:

"The complaint or petition [illegible]
of the contract or subcontract on which it is [illegible]
when made, and when completed, if not completed, [illegible]

This section applies to pleadings and does not [illegible]
to proofs. No objection was made in the trial court, [illegible]
urged here, that the intervening petition is defective in [illegible]
spect, or that there was any variance between it and the [illegible]
In Zander Hamm Co. v. Congregation Sinai Adonai [illegible]
a claim for lien filed within the statutory [illegible]
tion of the work, [illegible] held, although [illegible]
time of completion was that it was done "about the [illegible]
of September, along in there somewhere; I don't [illegible]
date." The proofs were sufficient to establish the claim.

Appellants further contend that the [illegible]
improper because of the fact that [illegible]
in which it was held in [illegible] interest [illegible]
sufficient consideration, and in [illegible]
the circumstances of the case [illegible]
cases cited were controlled by [illegible]
allowing interest, [illegible] the lien [illegible]
the lien's act, supra, provides [illegible]
or other person [illegible]
services or [illegible] for the contractor [illegible]
not as a sub-contractor, and [illegible]
with interest on such amount from [illegible]

Under this section it has uniformly been held that the allowance of interest on subcontractors' liens is proper. (Murphy v. Cicero Lumber Co., 97 Ill. App. 510, 517; Merritt v. Crane Co., 126 id. 337, 343; Chicago Brick Co. v. McLester, 165 id. 114, 118.) Even after more than ten years had elapsed appellants took no step to bring the causes to trial, and the original complainant attempted to have the suits dismissed, to the prejudice of appellees. Whether appellants had settled with the complainant or made arrangements to do so is not shown by the record, but there is no showing from which it can be said that the delay was the fault of appellees or of either of them. The trial court correctly allowed interest on the claims.

The decree of the circuit court is affirmed.

Decree affirmed.

Under this section it has authoritatively been held [illegible] the [illegible] of interest on subcontractors' claims is [illegible]. [illegible] v. [illegible] Lumber Co., 97 Ill. App. [illegible], 217; Marshall v. [illegible], [illegible] 337, 343; Chicago [illegible] Co. v. [illegible], 165 [illegible], [illegible] 114; [illegible] after more than two years had elapsed [illegible] bringing the issues to trial, and the original contractor [illegible] to have the suits dismissed, to the prejudice of [illegible]. [illegible] appellants had settled with the [illegible] [illegible] do so is not shown by the record, nor there is no knowledge from which it can be said that the delay was in fault of appellees or of either of them. The trial court correctly allowed interest in the claims.

The decree of the circuit court is affirmed.

Decree affirmed.

321 Ill. App.

Abstract

GENERAL NO. 9927 AGENDA NO. 20

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

321 I.A. 365

OCTOBER TERM, A. D. 1943

In the Matter of the Estate of Thomas F. Berry, deceased.	
Francis Ortscheid and Joseph Kissem, Administrators De Bonis Non With the Will Annexed of the Estate of Thomas F. Berry, Deceased, Appellees,	Appeal from Circuit Court of Jo Daviess County.
Vs.	
Thomas Berry, Jr., Appellant.	

Dove, P. J.:

Thomas Berry, Jr., one of the two sons and a devisee of Thomas F. Berry, deceased, has appealed to this court from a decree of the circuit court of Jo Daviess County, ordering the sale of a portion of the testator's real estate to pay debts created by costs of administration, consisting principally of fees and court costs.

The testator died in 1931, leaving Ellen Berry, his widow, and Thomas Berry, Jr., appellant, and John M. Berry, his two sons. The latter and the widow were executors of the will, which gave the widow the income from the entire estate during her natural life, with a provision that if such income should not be sufficient for her support and maintenance in health and sickness, she would have the right to the use of the principal of the estate for all such purposes. After the death of the widow, certain

[illegible]

[illegible]

[illegible]

[illegible]

In the matter of the estate of Thomas F. Berry, deceased.	
Francis [illegible] [illegible] Hogan, administrator [illegible] [illegible] with the will annexed of the Estate of Thomas F. Berry, Deceased, Appellees, vs. Thomas [illegible] Appellant.	[illegible]

Dove, P. J.:

[illegible]

[illegible] a [illegible]

a decree [illegible]

the sale of a [illegible]

debts [illegible]

of fees and costs [illegible]

The testator died in 1[illegible], leaving [illegible] and Thomas Berry, [illegible] The latter [illegible] the widow the [illegible] life, with a vested [illegible] entitled for her [illegible] the world have the right [illegible] for all such purposes. [illegible]

real estate was devised to each son, and the residue of the estate was given them in equal shares.

Shortly after letters testamentary were issued, an inventory was filed describing the real estate and showing one $100.00 Liberty bond. No further proceedings were had in the estate until March 12, 1938, at which time John M. Berry filed a report as surviving executor, the widow having died shortly previous in 1937. Because of the interest of the judge of the county court, who had acted as attorney in the case prior to his election, the cause was certified to the circuit court.

An amended report and a second and a third report were filed, and upon the petition of the surviving executor the court entered an order for the public sale of ten shares of the capital stock of the First National Bank of Galena; a balance of $404.81 on a claim against the receiver of the Galena National Bank; and a claim of $280.00 for rent against Harry Bastian. These items were sold at public sale on January 11, 1940, to Stella Berry, wife of the surviving executor, on her bid of $800.00 for the bank stock, $50.00 for the claim against the receiver of the Galena National Bank, and $5.00 for the claim against Harry Bastian. A report of that sale was approved by the court.

Upon a later petition of the surviving executor, the court entered a decree to sell real estate to pay debts, and upon an appeal therefrom to this court by the same appellant as in this case, the decree was reversed and the cause was remanded, because the report of the surviving executor showed that all the indebtedness on account of which the sale was sought to be made was incurred by the executors themselves after the death of the testator. (Berry v. Berry, 309 Ill. App. 7.)

After the remanding order was filed in the circuit court, the surviving executor filed a subsequent report up to May 16, 1941, showing his total disbursements exceeded his total receipts by $850.79. Appellant filed a petition alleging that the surviving

executor was occupying the residence property specifically devised to appellant, and praying for delivery of possession to him, the payment of all rents therefrom collected by the surviving executor since the death of the life tenant, and for distribution to him of one half of all the personal estate belonging to the testator at the time of his death. The surviving executor died, the petition was answered by his executrix, and the court entered an order requiring her to deliver possession of the premises mentioned to appellant and to account for the rents. A subsequent order found that the rent collected exceeded the disbursements by $679.85.

Appellees were appointed administrators de bonis non with the will annexed of the estate of Thomas F. Berry, and in the county court, Stella Berry, the widow of John M. Berry, was appointed executrix of his estate, and Francis Ortscheid was appointed administrator of the estate of Ellen Berry, deceased widow of Thomas F. Berry. Appellant filed a petition in the circuit court against all of them asking that Francis Ortscheid be required to account for and pay to appellant all rents collected by him from the above mentioned property owned by appellant; that Stella Berry be required to pay him the sum of $679.85 above mentioned, and $138.00 alleged to have been found to be due him by the judgment of this court on the prior appeal; that she be ordered to deliver to him one half of the household furniture and other chattel property of the estate of Thomas F. Berry, and to pay appellant, out of the funds of John M. Berry, deceased, $20.00 per month rental for the premises devised to appellant, and occupied by them since the death of Ellen Berry; that as such executrix she be required to inventory in the estate of John M. Berry, deposits in the Galena National Bank and Merchants National Bank of Galena, aggregating $6545.32 as assets of the estate of Thomas F. Berry, deceased, and to deliver such sum to appellees for distribution under his will; and that Stella Berry and Francis

Ortscheid be required to account for the rents of the other real estate.

Stella Berry answered the petition and filed a cross complaint alleging that there was due and owing to John M. Berry the sum of $850.78 for money advanced by him for the support, maintenance and care of Ellen Berry, as disclosed by his reports as surviving executor; that in addition thereto, the widow's funeral expenses, amounting to $311.00, and a charge of $90.11 owing the Galena Catholic Cemetery Association for perpetual care of the burial lot of Thomas F. Berry, had not been paid; and alleging the the petitioner had occupied a dwelling belonging to the estate of Thomas F. Berry, ever since his death, and had paid no rent; that the taxes, insurance and maintenance had been paid by the estate, and asking for an accounting.

Appellees filed two reports the last one of which showed a balance on hand of $222.99. Upon their petition, and a petition by their attorneys, the court fixed the fees of John M. Berry for his services as executor at $200.00, and fixed $800.00 as attorney's fees for appellees' attorneys. The order contains a finding that such fees are the usual, reasonable and customary fees in similiar cases.

Appellant filed another petition asking that appellees be ordered to pay him $186.00, allegedly collected by them as rent from his property; that the order fixing attorney's and "administrator's" fees be vacated; that the proceeds of the sale of the bank stock and other personal property be distributed in accordance with the will of Thomas F. Berry, deceased; that the estate of John M. Berry be surcharged with $6545.32 bank deposits and the $100.00 Liberty bond, and that the real estate described in the petition be ordered sold, and the proceeds applied to pay costs and charges against the estate due and to accrue; and that the debts, demands and charges due and owing the petitioner be paid, and the balance, if any, be distributed under the terms of the will.

This petition was dismissed on motion of appellees, and the decree appealed from was entered upon their petition, an answer of appellant, and a hearing.

The first ground urged for reversal is that the testator had no debts, and that his real estate could be ordered sold to pay only such debts as were actually contracted by him before his death, and his funeral expenses. Section 336 of the Probate act (Ill. Rev. Stat. 1943, chap. 3, par. 490) provides that the executor, administrator, administrator to collect, guardian or conservator shall be allowed reasonable compensation for his services, and section 337 makes similar provision for the attorney for any such legal representative. Obviously such compensation is a part of the expenses of administration. By section 202 of the Probate act, expenses of administration and funeral expenses are claims of the first class. If there is no personal property out of which the expenses of administration can be paid, there is no other source for payment than the real estate. Our expression in the opinion on the former appeal that "such debts that have actually been incurred by the testator himself, pripr to his death, and his own funeral expenses, are the only debts that can be considered by the court in ordering real estate to be sold to pay debts", was used to distinguish between liability for debts actually incurred by a decedent, and debts voluntarily incurred by an executor after the decedent's death, and was not meant to be taken as holding that expenses of administration, liability for which is established by law, cannot be included as debts for which a decedent's real estate can be sold.

Although $300.00, on deposit in the Merchants National Bank of Galena, and $3545.82, on deposit in the Galena National Bank, at the time of the testator's death, was not listed in the inventory filed by the executors, the surviving executor charged himself with these items in his first report, filed on March 12, 1938. That report, as originally filed, showed the amounts disbursed exceeded the total receipts by $3,049.21. advanced by the surviving executor with the proceeds of the $100.00 Liberty bond and other

Surviving executor. An amendment to the report charged the

receipts, with a credit of $404.81 uppaid balance on the claim against the receiver of the Galena National Bank, which closed on March 4, 1833 bringing the excess of the disbursements over the receipts to $2360.00. Such excess was $2,282.55 in the second report, and $1427.55 in the third report. In his fourth report, filed after the first decree for the sale of real estate to pay debts was reversed by this court, such excess of disbursements over receipts was shown as $850.79. Items of receipts in all the reports included the rents received from the real estate. The surviving executor also charged himself with the proceeds of the sale of the stock in the First National Bank of Galena, of the claim against the receiver of the National Bank of Galena, and of the claim against Harry Bastian heretofor referred to. These sales were to Stella Berry, wife of the surviving executor, at public vendue, held under an order of the court, entered upon the petition, of the surviving executor, and the sales were approved by the court. The surviving executor had previously taken credit for $1250.00 as the purchase price of the bank stock, which was issued and stood on the books of the bank in the name of the widow, Ellen Berry. The first report also showed advancements of $800.00 to the surviving executor and $1300.00 to appellant. An item of credit for $475.00 paid for a monument and sundry payments on a note are complained of as improper.

The reports of the surviving executor show that the $6545.82 and the other receipts were used in paying taxes and upkeep of the real estate, and in the support and maintenance of the widow. The claim that the sale of the bank stock and other items of personal property was invalid and void, because made by the surviving executor to himself is without foundation, and is unsupported by any proof. We think the record sufficiently shows that the bank stock was purchased as a source of income, and was the property of the estate. Appellant is in no position to claim the advancements to him and the surviving partner were a devastavit. He can not

complain of an act to which he was a party and a beneficiary.

The above matters are urged as reasons why no fees should be allowed the surviving executor. We find no merit in the contention. So far as the record shows the transactions were all in good faith, and the serveral reports of the surviving executor were approved by the court, several of them being approved after objections thereto were overruled. A hearing was had when the third report was filed, and most of these matters were gone into in the testimony of the surviving executor. In the absence of a showing to the contrary, we assume that the court was justified in approving the reports.

As to the attorney's fees fixed by the court, judicial notice of the nature and extent of the services which had been rendered would be taken by the court, and the order recites that the fee fixed is the usual, reasonable and customary fee for such services. In Griswold v. Smith, 116 Ill. App. 225, relied upon by appellant, the court held that it was error to allow executor's fees to one executor when there were three living and acting as such. That case has no application here, where there is no showing that the widow ever rendered any actual service to the estate. She was not living when the order fixing executor's fees was entered, no claim for fees for her is made by her legal representative, and there is no claim by anybody that she was entitled to any fee as executrix.

Issues between appellant and the legal representatives of the different estates of the parties in interest as to the former's right to possession and the rents from the real estate devised to him have no bearing on the question of the right of appellees to sell other real estate of the decedent to pay costs of administration. The decree appealed from was properly entered and is affirmed.

Decree affirmed.

complain of an act to a lar [illegible]

The above [illegible]

be allowed the advice [illegible]

contribution [illegible]

all in [illegible]

executor were [illegible]

proved after [illegible]

when the [illegible]

gone into the testimony [illegible]

of a [illegible]

in approving the [illegible]

As [illegible]

notice of the [illegible]

rendered would [illegible]

the fee fixed [illegible]

services. In [illegible]

by [illegible]

[illegible]

such. [illegible]

[illegible]

She was not living [illegible]

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the different [illegible]

right to [illegible]

to him have [illegible]

to [illegible]

[illegible]

affirmed.

[illegible]

321 I.A. 335

GEN. NO. 9913 AGENDA NO. 12

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1943.

RAYMOND G. THOMPSON, APPELLANT,	)	
vs.	:	APPEAL FROM THE COUNTY COURT OF PEORIA COUNTY.
CHARLES W. KENT, OTHERWISE KNOWN AS C. W. KENT, DOING BUSINESS AS ELECTREAT MANUFACTURING COMPANY, OF THE CITY OF PEORIA, ILLINOIS, APPELLEE.	)	

HUFFMAN, J.

Appellant filed suit against appellee to recover for services as an attorney. Appellee filed answer. Subsequently, appellee made motion to file an amended answer. Appellant objected to the motion of appellee for leave to file an amended answer. Such objections were denied, and appellee granted leave to file amended answer. Same was filed. Thereupon appellant filed motion to set aside the order of the court granting appellee leave to file the amended answer. Such motion was denied. Appellant then announced his election to

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

vs.

[illegible]

[illegible]

[illegible]

Appellant filed [illegible]
for [illegible]
[illegible], applies [illegible]
[illegible]. [illegible]
for leave to file [illegible]
were denied, [illegible]
[illegible]
[illegible] to set aside the [illegible]
[illegible]
was denied. [illegible]

abide by said motion, refused to further proceed, and filed such election in writing as follows:

> "PLAINTIFF'S ELECTION AND MOTION FOR ENTRY OF JUDGMENT THEREON.
>
> Now comes the Plaintiff, Raymond G. Thompson, by Ira J. Covey, Wayne H. Mathis and Chester F. Barnett, his attorneys, and excepts to the Order entered in the above-entitled cause on March 30, 1943, and elects to abide by his Motion filed herein on March 22, 1943, entitled "Motion to Strike Amended Answer," etc., and thereupon moves the Court to enter herein the proper judgment upon such election.
>
> Ira J. Covey,
> Wayne H. Mathis,
> Chester F. Barnett,
> Attorneys for Plaintiff."

Pursuant to the above action by appellant, the court entered judgment for appellee-defendant with judgment against appellant for costs. Appellant brings this appeal from such judgment.

Under para. 46 of the Civil Practice Act (Sec. 170, Ch. 110 - (1943 Ill. St.), the court was fully empowered to grant appellee leave to file amended answer.

The court did not err in granting appellee leave to file its amended answer, and its action in such respect was proper.

Order and judgment affirmed.

abide by said motion, required to further answer, and filed such election in writing as follows:

"IN THE TITLE'S ELECTION AND MOTION FOR ANSWER OF ADDRESS TRANSCRIPT.

Now comes the plaintiff, Jerome C. Thompson, by Ira J. Dovey, Wayne H. Mathis and Charles F. Barnett, his attorneys, and accepts to the order entered in the above-entitled cause on March 20, 1962, and elects to abide by his motion filed herein on March 22, 1962, entitled "Motion to Strike Amended Answer," etc., and therefore moves the court to order herein the proper judgment upon such election.

Ira J. Dovey,
Wayne H. Mathis,
Charles F. Barnett,
Attorneys for Plaintiff."

Pursuant to the above action by appellant, the court entered judgment for appellee-defendant with judgment against appellant for costs. Appellant claims this appeal from said judgment.

Under Para. 46 of the Civil Practice Act, Ill. Ch. 110 - (1963 Ill. St.), the court was fully empowered to grant appellee leave to file amended answer.

The court did not err in granting appellee leave to file its amended answer, and its action in such respect was proper.

Order and judgment affirmed.

42722

BENJAMIN B. MORRIS,
APPELLEE,

v.

WACKER HOTEL COMPANY, an Illinois Corporation, LEO BLOOMBERG, FRANK FUCIK and BENJAMIN F. BILLS, individually and as Trustees under the Voting Trust Agreement dated May 31, 1935, relating to the capital stock of the Wacker Hotel Company, an Illinois Corporation,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

317
263

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse a judgment awarding a peremptory writ of mandamus commanding defendants to permit plaintiff to examine the books and records of the shareholders and unit holders of the Wacker Hotel Company.

The record discloses that plaintiff as the owner of 45 units of beneficial interest in the Hotel Wacker stock trust of a total of 6,100 units in the trust as defined in the trust agreement dated May 31, 1935, of 6,100 shares of stock of no par value of the Wacker Hotel Company, an Illinois corporation, brought this action praying that a writ of mandamus issue to compel defendants to permit him either in person or by his agent or attorney to examine all books and records of the stockholders and unit holders of the Wacker Hotel Company at some reasonable time or times and to allow him to make extracts from the books and records. After the issues were made up the cause was tried before the court without a jury, there was a finding and judgment in plaintiff's favor awarding the writ and defendants appeal.

Plaintiff predicates his right to examine the books of the corporation and the list of beneficial owners by virtue

of sec. 45, ch. 32, Ill. Rev. Stats. 1943. That section provides that "Any person who shall have been a shareholder of record for at least six months immediately preceding his demand or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes and record of shareholders and to make extracts therefrom."

Plaintiff alleged in his complaint that the Hotel Company is an Illinois corporation organized under the Business Corporation Act; that defendants Bloomberg, Roth and Lilin are the duly elected president, vice-presidents and secretary, respectively of the Hotel Company and that these three persons, as trustees under a voting trust agreement dated [illegible] 31, 1944, hold all the stock of the Hotel Company. That plaintiff is the owner and holder of participation certificates for 42 units [illegible] beneficial interest mentioned in the trust agreement [illegible] several dates he acquired the units); that he demanded of defendants that they permit him to examine the books, minutes and records of the shareholders and unit holders and to make extracts therefrom, which demand was refused. That their refusal was unlawful, arbitrary, capricious and an unreasonable exercise of power vested in them.

It further alleged that plaintiff's purpose was "proper and lawful" and he specified several reasons why he desired to examine the books and records.

Defendants filed a defense averring that the face of the complaint showed the court was without jurisdiction, that the

of sec. 45, ch. 32, Ill. Rev. Stats. 1945. [illegible] provides that "Any person who shall have been a stockholder of record for at least six months immediately preceding the demand or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes and records of stockholders and to make extracts therefrom."

Plaintiff alleged in its complaint that [illegible] total Company is an Illinois corporation organized under the Business Corporation Act; that defendants [illegible], [illegible] are the duly elected president, vice-president, [illegible] respectively of the Hotel Company; [illegible] that these [illegible] as trustees under a voting trust agreement dated [illegible], 1945, hold all the stock of the Hotel Company. [illegible] and holder of participation certificates [illegible] beneficial interest mentioned in the trust agreement [illegible] several dates be required [illegible]; that [illegible] that they permit him to examine [illegible] of the shareholders and unit holders [illegible] from, which demand was refused. [illegible] arbitrary, capricious and an unreasonable [illegible] vested in them.

It further alleged that plaintiff's purpose [illegible] and lawful" and he specified clearly reasons why [illegible] to examine the books and records.

Defendants filed a defense [illegible] the complaint showed the court was without jurisdiction, [illegible]

matters and things described in the complaint were cognizable only in a court of equity, etc. They also answered admitting several of the allegations of the complaint and averred that the books and records of the Hotel Company were in possession of its officers and the books and records of the voting trust agreement which contained a list of the beneficial units were in the hands of defendant trustees. The answer denies that they refused to comply with plaintiff's demand to examine the books and records of the Hotel Company but on the contrary, gave plaintiff permission to do so, but that they refused to let him examine the list of the owners of the beneficial certificate units. They denied the allegation of the complaint that plaintiff sought to examine the books and records for a "proper and lawful purpose" but averred that plaintiff's purpose was to harass, annoy and coerce defendants into purchasing their peace and to avoid extended and expensive litigation, etc., by paying to plaintiff an excessive amount for his participation certificates and that his conduct was not in good faith.

It seems to be conceded that plaintiff did not attempt to make proof that he sought to examine the books and records "for any proper purpose" and plaintiff takes the position that the burden of proving that his purpose was not for any lawful purpose was on defendants. And this was the view of the chancellor following an opinion of this court filed January 25, 1943, Morris v. Broadview, Inc., 317 Ill. App. 436. That case was taken to the Supreme court and was there pending at the time the court entered the judgment in the instant case, and we delayed somewhat the decision in the case at bar pending the opinion of our Supreme court in the Morris case. An opinion was rendered in that case January 18, 1944, where the decision of this court was held to be

matters and things described in the complaint were cognizable only in a court of equity, etc. They also interposed a traverse of several of the allegations of the complaint and averred that the books and records of the Hotel Company were in possession of its officers and the books and records of the voting trust agreement which contained a list of the beneficial units were in the hands of defendant trustees. The answer denies that they refused to comply with plaintiff's demand to examine the books and records of the Hotel Company but on the contrary, gave plaintiff permission to do so, but that they refused to let him examine the list of the owners of the beneficial certificate units. They denied the allegation of the complaint that plaintiff sought to examine the books and records for a "proper and lawful purpose" but averred that plaintiff's purpose was to harass, annoy and coerce defendants into purchasing their stock and to avoid extended and expensive litigation, etc., by paying to plaintiff an excessive amount for his participation certificates and that his conduct was not in good faith.

It seems to be conceded that plaintiff did not attempt to make proof that he sought to examine the books and records "for any proper purpose" and plaintiff takes the position that the burden of proving that his purpose was not for any improper purpose was on defendants. And this was the view of the majority of the court in its opinion following an opinion of this court filed January 28, 1944, Morris v. Broadview, Inc., 317 Ill. App. 480. That case was taken to the Supreme court and we have pending at this time the opinion of the Supreme court and we have before us in the instant case, and we have adopted the judgment in the instant case, and we have adopted the decision in the case at bar pending the opinion in our supreme court in the Morris case. An opinion was rendered in that case January 18, 1944, where the decision of this court was held to be

erroneous. The Supreme court in construing sec. 45, of the Business Corporation Act, above quoted from, held that the burden of proof was on plaintiff who sought to examine the books and records of a corporation of which he was a shareholder to show that his purpose in demanding the privilege of examining the books and records of the corporation "was proper and lawful." Morris v. Broadview, Inc., Docket No. 27217.

In the instant case since plaintiff attempted to make no proof that his purpose in demanding the privilege of examining the books and records was proper and lawful, the judgment appealed from must be reversed.

The judgment of the Circuit court of Cook county is reversed.

JUDGMENT REVERSED.

Niemeyer, J., concurs.
Matchett, J., dissents.

erroneous. The Supreme court in construing sec. 45, of the Business Corporation Act, above quoted from, held that the burden of proof was on plaintiff who sought to examine the books and records of a corporation of which he was a stockholder to show that his purpose in demanding the privilege of examining the books and records of the corporation "was proper and lawful." Morris v. Broadview Inc., docket No. 27217.

In the instant case since plaintiff attempted to make no proof that his purpose in demanding the privilege of examining the books and records was proper and lawful, the judgment appealed from must be reversed.

The judgment of the circuit court of Cook county is reversed.

JUDGMENT REVERSED.

Niemeyer, J., concurs.

Matchett, J., dissents.

42722

Abstract

BENJAMIN B. MORRIS,
Appellee,

v.

WACKER HOTEL COMPANY, an Illinois Corporation, LEO BLOOMBERG, FRANK FUCIK and BENJAMIN F. BILLS, individually and as trustee under the Voting Trust Agreement dated May 31, 1935, relating to the capital stock of the Wacker Hotel Company, an Illinois Corporation,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

317 A

SUPPLEMENTAL OPINION ON REHEARING

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

In the opinion we stated that plaintiff had alleged that he sought to examine the books and records for a "proper purpose" and that he had made no attempt to prove this allegation. In his petition for a rehearing he says that the court overlooked or misapprehended the fact that in his complaint he specified eleven reasons for wishing to make an examination of the books and records and attached exhibits to his complaint in which were enumerated the eleven reasons listed in the complaint and that the court took these into consideration in deciding the case. We think there is no merit in this contention.

Plaintiff further contends that if we decide to reverse the cause should be remanded and points to the opinion of the Supreme court in Morris v. The Broadview, Inv., 385 Ill. 228, which case was mentioned in our opinion, and says that the court there reversed the judgment of the superior court and this court and remanded the cause for further proceedings. We think there is merit in this contention for the reason that the plaintiff in the trial court relied upon our opinion in the Broadview case which placed the burden of proof on the defendant to show that plaintiff's

SUPPLEMENTAL OPINION ON REHEARING

purpose in seeking to examine the books and records was improper. And since the cause must be remanded we think we ought to say that mandamus was a proper action to bring in the instant case and that plaintiff was not required to bring his suit in equity, as counsel for defendant contend, although plaintiff was not technically the holder of stock in the hotel corporation but only the owner of the beneficial interest in 45 units for 45 shares of stock. The owners of the trust certificates were the real owners of the hotel, and all that plaintiff seeks to do is to ascertain whether one of the important purposes of the trust, to which he is a party, has been faithfully served.

The petition for rehearing is denied, but the judgment of this court reversing the judgment of the Circuit court of Cook county is set aside and the judgment of the Circuit court of Cook county is reversed and the cause remanded for further proceedings.

REHEARING DENIED.

Niemeyer, J., and Matchett, J., concur.

purpose in seeking to examine the books and accounts was improper. And since the cause must be remanded we think we ought to say that mandamus was a proper action to bring in the instant case and that plaintiff was not required to bring his suit in equity, as counsel for defendant contend.Although plaintiff was not technically the holder of stock in the hotel corporation but only the owner of the beneficial interest in 45 units for 45 shares of stock. The owners of the trust certificates were the real owners of the hotel, and all that plaintiff seems to do is to ascertain whether one of the important purposes of the trust, to which he is a party, has been faithfully served.

The petition for rehearing is denied, but the judgment of this court reversing the judgment of the circuit court of Cook county is set aside and the judgment of the circuit court of Cook county is reversed and the cause remanded for further proceedings.

REMANDED WITH.

Niemeyer, J., and Hotchkiss, J., concur.

Abstract

Gen. No. 9921. Agenda No. 16.

IN THE

APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT.

OCTOBER TERM, A. D. 1943.

C. H. LARSON, Plaintiff-Appellant, vs. WALTER K. JOHNSON, Administrator With the Will Annexed of the Estate of Ida E. Johnson, Deceased, and AXEL EMIL JOHNSON, Defendants-Appellees.	APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY, ILLINOIS.

WOLFE,-- J.

The appellant, C. H. Larson, filed a petition in the Circuit Court of Winnebago County, alleging that on July 7, 1942, he recovered a judgment of reviver against Axel Emil Johnson in the sum of $438.16, with interest thereon, from July 29, 1924, and the costs of three proceedings; that said judgment remains in full force and effect; that to secure satisfaction thereof, he obtained an execution on said judgment July 13, 1942, and placed the same in the hands of the Sheriff of Winnebago County, Illinois, on July 21, 1942;

that the defendant, Axel Emil Johnson, had been married to one, Ida E. Johnson, but she had divorced him prior to the time of the last judgment; that Ida E. Johnson departed this life testate on April 30, 1942, in the County of Winnebago and her estate is now being settled in the probate court of said county; that Walter K. Johnson is acting as administrator of said estate; that at the time of the death of said Ida E. Johnson, she was seized and possessed of a 160 acre farm in Winnebago County, Illinois.

The petition further charges that by the will of said Ida E. Johnson, she directed certain payments to be made to her former husband. The second paragraph of said will being as follows: "I hereby direct my executor hereinafter named to pay to Axel Emil Johnson Twenty five 00/100 Dollars per mo. during his natural life and the same shall be a lien on my farm." The petition then charges that the estimated value of the farm in question is about $11,000.00, and the personal estate is valued at approximately $6,000.00; that the execution placed in the hands of the Sheriff of Winnebago County, became, and was, a lien upon all the right, title, interest and income of the said defendant, Axel Emil Johnson, under the said last will and testament of Ida E. Johnson, deceased, to-wit, the sum of $25.00 per month so long as said Axel Emil Johnson lived; that said Sheriff of Winnebago County, Illinois, did levy said execution upon "all of the right, title, interest and income of

Axel Emil Johnson, as legatee devisee, under the Last Will and Testament of Ida Johnson, Deceased, which is made a lien upon the following described lands: the Southwest ¼ of Section 34, Township 46 North, Range 1 East, of the Third Principal Meridian, containing one hundred and sixty (160) acres, more or less, all located in the County of Winnebago, and State of Illinois," and did thereafter, on August 26, 1942, after first complying with the Statutes of the State of Illinois in such case made and provided, offer for sale and sell "all of the right, title, interest and income of Axel Emil Johnson, as legatee devisee, under the Last Will and Testament of Ida Johnson, Deceased, which is made a lien upon the following described lands: the Southwest ¼ of Section 34, Township 46 North, Range 1 East, of the Third Principal Meridian, containing one hundred and sixty (160) acres, more or less, all located in the County of Winnebago, and State of Illinois," to the highest and best bidder, Frank E. Maynard, Trustee, for the sum of $438.16, and that in making said bid and purchase the said Frank E. Maynard, Trustee, was acting for and on behalf of plaintiff, and that plaintiff, C. H. Larson, is now the owner of said right, title, interest and income of said Axel Emil Johnson."

The petition further charges that notice was served upon the executor of the last will and testament of Ida E. Johnson, Deceased, of the aforesaid proceedings and demand made that it be paid to C. H. Larson, the plaintiff in said case, or to his attorney, Frank E. Maynard; that said Walter K. Johnson the said

Axel Emil Johnson, et ux versus Lorenz, [illegible] the last will and Testament of Ida M. Ward, Deceased, which is made a lien upon the following described land: The Southwest [illegible] of Section 34, Township 40 North, Range 1 East, of the Third Principal Meridian, containing one hundred and sixty (160) acres, more or less, all located in the County of Winnebago, and State of Illinois," and did thereafter, on August 5, 1920, enter into joint conveying with the Sheriff of the State of Illinois in such case made and provided, which the said [illegible] of the [illegible], right, interest and income of Axel Emil Johnson, in [illegible] devised under the last will and Testament of Ida Ward, Deceased, which is made a lien upon the following described land: The Southwest [illegible] of Section [illegible], Township [illegible] North, Range 1 East, of the Third Principal Meridian, containing one hundred and sixty (160) acres, more or less, all located in the County of Winnebago, and State of Illinois," to the highest and best bidder, Frank E. Lawrence, [illegible], for [illegible] 40 [illegible], and that in making said bid and purchase [illegible] Trustee, was acting for and on behalf of plaintiff, the said plaintiff, O. M. Larson, [illegible] owner of said right, title, interest and income of said Axel Emil Johnson."

The petition [illegible] the [illegible] the executor of the last will and testament of [illegible], Deceased, of the aforesaid proceedings and [illegible] be paid to O. M. Larson, the plaintiff herein [illegible] attorney, Frank E. Lawrence, then said [illegible] Johnson to said

administrator has neglected and refused to make such last payment, as was demanded; that by the terms of said will, the legacy to be paid Axel Emil Johnson is a continuing one and the exact amount that he will receive cannot be correctly ascertained, and to enforce the plaintiff's claim, he does not have an adequate remedy at law; that he has no sufficient remedy, except in a Court of Equity, by mandatory injunction, on behalf of the administrator of the estate of Ida E. Johnson, Deceased, to pay over to the plaintiff the money that is alleged to be due him. Then follows the prayer for relief. The plaintiff asked leave to amend his prayer for relief, based on the same facts except more in detail. The amendment of the complaint is substantially as hereinbefore stated.

The defendant, Walter K. Johnson, as administrator and Axel Emil Johnson filed a joint motion to dismiss the complaint, and for the reasons thereof, states as follows:

"I. The defendant, Axel Emil Johnson, has no fixed and vested right in the estate of Ida E. Johnson, deceased.

"II. The interest of Axel Emil Johnson in and to the estate of Ida E. Johnson is not subject to levy and sale under the facts and circumstances alleged in the Amended Complaint.

"III. The interest of the defendant, Axel Emil Johnson, in and to the estate of Ida E. Johnson, deceased, is neither assignable nor transferable by him.

"IV. The plaintiff herein acquired no right, title, or interest as purchaser at the execution sale referred to in paragraph 16 of the Amended Complaint.

[illegible]

[illegible]

"II. [illegible]

"III. [illegible]

"IV. [illegible]

"V. Neither from said Complaint nor particularly from paragraph 7 thereof does it appear that the defendants, or either of them, have such right, title or interest in the premises described in paragraph 6 as is subject to execution, levy and sale under the judgment described in paragraph 1 of said complaint, which judgment was heretofore obtained by the plaintiff against the defendant, Axel Emil Johnson.

"VI. It appears on the face of said complaint that the same fails to plead any cause of action, either in law or in equity, upon which the relief, or any part thereof, prayed for may be granted."

The Court sustained the motion to strike and dismissed the bill of complaint for want of equity, and assessed the costs of suit against the plaintiff. It is from this judgment that an appeal is perfected.

The trial court in rendering his decision stated, that he considered the bill in question, "a creditor's bill," and that Section 49 Chapter 22 Smith-Hurd Annotated Statutes should apply. The appellant seriously insists that this bill is not a creditor's bill, and therefore the Statute in question, has no application. The Statute in question is as follows: "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property

or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself."

It is conceded that the defendant, Johnson, contributed nothing to this fund, but it was a gratuitous gift to him from his former wife.

Probably the first time this Statute was passed on by our Supreme Court was in the case of Steib vs. Whitehead, 111 Ill. 247. In the case of ReQua vs. Graham 187 Ill. at Page 71, the Court comments on this decision, and they say: "That case and kindred cases rest in a large part upon the distinct ground that a creditor is not defrauded and therefore has no cause of complaint, because the owner of property, in the free exercise of his will, so disposes of it that the object of his bounty, who parts with nothing in return, has a sufficient income provided for and applied to his life support."

From an examination of the appellant's complaint, it is our conclusion that in substance this is a creditor's bill, and the Court properly found that Section 49 Chapter 22 of the Chancery Act, Smith-Hurd Annotated Statute, applies, and the Court properly sustained the motion to dismiss the complaint.

Judgment Affirmed.

41999

321 I.A. 625

AGNES NEERING,

Appellee,

v.

ILLINOIS CENTRAL RAILROAD COMPANY, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

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MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Agnes Neering filed a complaint in the Circuit Court of Cook County against the Illinois Central Railroad Company asking damages for injuries suffered on September 6, 1938 as a result of being assaulted while she was awaiting the arrival of a suburban train at Riverdale Station. A trial before the court and a jury resulted in a verdict in her favor of $5,000. The court overruled defendant's motion for a judgment notwithstanding the verdict and for a new trial and entered judgment on the verdict. On appeal we reversed the judgment and remanded the cause with directions to enter judgment for the defendant. The Supreme Court reversed our judgment and remanded the cause with directions to consider the assignments of error other than the one decided by it and to affirm the judgment of the trial court or reverse the judgment and remand the cause. The facts are fully stated in the two opinions. Neering v. Illinois Central Railroad Co. 315 Ill. App. 599; 383 Ill. 366.

Defendant complains that while the jury in this case was being selected, a jury in another case started to return its verdicts in open court; that the court refused defendant's request to excuse the jury in the instant case; that the jury remained in the courtroom while two guilty verdicts were returned in its presence and hearing, and that this action of the court was clearly prejudicial to the defendant. Counsel for defendant made the suggestion to the court that the jury be excused while the other verdicts were being read,

ADAMS v. [illegible]

[illegible]

v.

ILLINOIS CENTRAL [illegible]
a corporation,

Appellant.

MR. JUSTICE [illegible]

[illegible] filed a complaint [illegible] against
Cook County against the Illinois Central [illegible] seeking
damages for injuries sustained on [illegible] by plaintiff
being assaulted while on [illegible] between
train at Riverdale station. [illegible] injury
resulted in a verdict in [illegible]. [illegible] verdict
defendant's motion for a judgment notwithstanding the verdict and
for a new trial and entered judgment on the verdict. [illegible]
we reversed the judgment and [illegible] the direction to
enter judgment for the defendant. [illegible] judgment
judgment and remanded the [illegible] with directions to [illegible]
assignments of error other than [illegible] the
the judgment of the trial court [illegible] the
the cause. The facts are fully [illegible]. [illegible]
v. Illinois Central Railroad Co. [illegible]

[illegible] complains [illegible]
being selected, a jury in [illegible]
in open court; that the court [illegible]
the jury in the instant case; [illegible]
while two guilty verdicts [illegible]
and that this action [illegible] defendant. [illegible]
that the jury be renewed [illegible]

but it did not make any motion to that effect. The record does not show what kind of a case the other jury was considering. In our opinion the exclusion of the jury at the time the other verdicts were being returned was a matter within the sound discretion of the trial judge.

Defendant complains that it was prejudiced by another occurrence during the trial. On rebuttal, plaintiff took the stand and denied certain matters she had covered in chief. She said that she had not had a dollar on the occasion in question. As she stepped from the stand, the court in the hearing of the jury, stated: "Waitresses don't have a dollar, is that it?", and plaintiff answered: "You're telling me - nothing at all." On defendant's objection to these remarks, the court said to the jury: "I perhaps should not have said it, but it is unimportant. I am sure the jury will so consider it." The record shows that the remark by the court was made to the witness at the close of the afternoon session, after she had been dismissed as a witness. The attorney for the defendant did not hear the remark at the time. He read the transcript of the testimony before the trial was resumed next morning and called the incident to the attention of the trial judge. This attorney was then of the opinion that the remark of the judge did not prejudice the defendant. He felt, however, that the remark of the witness did prejudice the defendant. The court stated that he was sure that the jury would disregard the incident and the trial went on. Defendant points out that the courts have held that any reference tending to indicate poverty of one party is highly prejudicial. The jury was instructed to disregard the incident. The jurors knew that plaintiff was a poor girl. She was employed as a waitress and had to arise about 4:00 o'clock in the morning in order to go to her place of employment. While it is unfortunate that the incident took place, our view is that the defendant

but it did not [illegible]

show what kind of [illegible]

opinion the [illegible]

were going [illegible]

the trial judge.

Defendant [illegible]

occurrence during the [illegible]

and called [illegible]

she had not had [illegible]

from the sign, the [illegible]

"Witness lied [illegible]

"You're telling [illegible]

these remarks, the [illegible]

said it, but it is [illegible]

it." The remarks [illegible]

witness at the [illegible]

dismissed [illegible]

the remark at the time. [illegible]

before the trial [illegible]

the attention of the [illegible]

that the remark [illegible]

fail, however, but [illegible]

the court stated that [illegible]

the incident and the trial [illegible]

courts have held that any [illegible]

one party is clearly [illegible]

the incident. The jurors were [illegible]

was employed as a witness [illegible]

morning in order to [illegible]

unfortunate that [illegible]

was not prejudiced by it. Defendant urges that on rebuttal the court not only permitted plaintiff to re-emphasize by denial certain statements already denied in chief, but permitted the introduction of a new witness, Brown, the only one who attempted to corroborate her in her testimony in chief. The accepted procedure is for the party holding the affirmative of an issue to introduce in rebuttal only such evidence as can answer new affirmative matter introduced by his adversary. The admission of such testimony ordinarily rests in the sound discretion of the trial court. We hold that the action of the court in permitting the witness to testify was not an abuse of this discretion.

Defendant insists that the court erred in excluding certain evidence as to what was done in similar situations on other railroads. Plaintiff charged a general, continuing duty to provide attendants and maintain alarms and signal devices on the platform. A third charge, failure to post notice that the station was frequented by tramps, was also made. Defendant admits it provides no alarms or signal devices on the Riverdale Station accessible to the passengers, but alleges it was under no duty whatever to do so. Defendant also admitted it did not have guards or attendants continuously on duty at the Riverdale Station, but alleges it was under no duty to do so, and that the evidence shows it fully discharged every duty of inspection. Defendant states that the standard of ordinary care required in any case is what is done by the "ordinary man" under the same circumstances, and that the testimony shows that the other railroads in Chicago and vicinity having suburban platforms similar to defendant's Riverdale Station, operate the same way as did defendant. Except for two loop stations and Harvey, where main line trains stop, there were no attendants on any suburban platforms of defendant between 10:00 p.m. and 6:00 a.m. The agent at Harvey went off duty at 12:30 a.m. The suburban stations were checked from time to time by special officers. The court allowed testimony as to the conditions

was not prejudiced by it. Defendant urges that in permitting the court not only permitted plaintiff to re-examine his original witnesses statements already denied in chief, but permitted the introduction of a new witness, Grove, the only one who attempted to corroborate her in her testimony in chief. The case [illegible] Proceed party holding the affirmative [illegible] in issue is improper in permitting only such evidence as can answer new matter introduced by his adversary. The admission of such testimony is usually made in the sound discretion of the trial court. We make no [illegible] of the action of the court in permitting the witness to testify notwithstanding of this discretion.

Defendant insists that the court erred in excluding certain evidence as to what was done in similar circumstances or other railroads. Plaintiff charged [illegible], contributing duty [illegible] attendants and maintain places and signal devices [illegible]. Third charge, failure to post notice [illegible] complained by trespass, was also made. Defendant [illegible] provided no alarms or signal devices on the irregular station [illegible] in the occurrence, but alleges it was under no duty [illegible]. Defendant [illegible] admitted it did not have [illegible] at the Riverdale station, but claims it was [illegible] and that the evidence shows it fully [illegible] every duty of inspection. Defendant [illegible] required in any case is what is done by the [illegible] under the same circumstances, and that [illegible] railroads in Chicago and vicinity [illegible] to defendant's Riverdale station, [illegible]. Except for two [illegible] stations [illegible], there were no attendants on any subject [illegible] between 10:00 a.m. and 6:00 a.m. The [illegible] only at 12:30 a.m. The suburban stations were checked from time to time by special officers. The court allowed testimony in the conditions

existing at the other suburban stations of defendant. Defendant tendered as witnesses supervising officials of the Rock Island and Northwestern railroads and Chicago Rapid Transit (Elevated) Lines to show what was done in similar situations on those lines. The court sustained plaintiff's objections to this testimony, and it was all heard in chambers. The Rock Island railroad maintained a suburban service through the southern part of Chicago and extending to Joliet. It reached one station, Blue Island, which was also served by defendant's suburban trains. There were no guards or attendants on any Rock Island suburban platform after the early evening hours, though the platforms were open to receive and discharge passengers from trains leaving Chicago as late as 1:30 a.m., and starting as early as 4:30 a.m. The platforms were open all night, but were not lighted after the 1:30 train passed, until the lights were turned on automatically before the 4:30 train arrived. The Rock Island goes through industrial and railroad territory and some suburban stations are immediately adjacent to railroad yards. There is no police protection at any of those suburban stations, other than traveling special officers who drop in whenever they are in the territory. On the Chicago Rapid Transit Lines there were 20 stations with no employees on duty at any time. Trains stopped at these stations every half hour after midnight. There were 57 stations with agents only on duty during the day and early evening, making a total of 77 stations open after midnight with no agent on duty. Thirty of these stations were on a line which parallels the main passenger and freight lines of the Northwestern railroad. Some were outside of the city on a branch which operated at grade on the same level as the adjoining main freight and passenger lines of the Great Western railroad. Other such stations were in the stock yards and in railroad and industrial territory. All such stations were open all night to receive and discharge passengers. The Northwestern railroad operated three

suburban lines, north 35 miles to Waukegan, northwest 63 miles to Harvard and west 35 miles to Geneva. There were no trains between 1:10 a.m. and 4:30 a.m. On the Waukegan branch the agent at Evanston was on duty for all trains, but there were no agents after 10:20 p.m. at the other 24 stations where the trains stopped. The 63 mile Harvard service operated all the way over the same roadbed as the main passenger and freight line of the Northwestern. It crossed three other main freight lines, one the Chicago Outer Belt. The agent at Harvard was on duty for all trains. Three other important stations had agents until 9:30 p.m. and 11:30 p.m. The agents at the rest of the 25 stations all left earlier. The Geneva branch of the Northwestern also crossed a few freight lines. All agents except at West Chicago and Oak Park left in the early evening. Each of these witnesses testified there were no phones, sirens, flares or signals of any type accessible to passengers on any of their suburban or elevated stations in Chicago or vicinity. The testimony of these witnesses tended to show that in the operation of its Riverdale Station defendant was exercising at least as much care as was the uniform standard of the industry. Plaintiff asserts that the action of the court in declining to permit defendant to introduce the proffered testimony was proper, and points out that the offer of proof did not contain any suggestion that the conditions at the depots of the other railroads were similar to the tramp infested condition at the 137th Street Station; that it does not appear anywhere in the offer of proof that there were ever any tramps or hoboes habitually in the depots of the other railroads, or that a "hobo jungle" was within a short distance of such depot; that such railroads were ever given notice of tramps or hoboes infesting their stations, or that such depots were isolated. Plaintiff argues that the proffered evidence would not only raise collateral issues as to conditions around other

suburban lines, more [illegible]
Harvard and West [illegible]
1:10 a.m. and 1:20 a.m. [illegible]
was on duty for all trains [illegible]
p.m. at the above [illegible]
Harvard service operated [illegible]
main passenger and [illegible]
these other main [illegible]
agent at Harvard [illegible]
stations had gone until [illegible]
the rest of the [illegible]
the Northwestern [illegible]
except at [illegible]
of these witnesses [illegible]
or signals of any kind [illegible]
suburban or any [illegible]
of these witnesses [illegible]
Riverdale station [illegible]
was the uniform [illegible]
action of the court [illegible]
proffered testimony [illegible]
proof did not contain [illegible]
of the other railroads [illegible]
at the 137th Street station [illegible]
offer of proof that [illegible]
in the depots of [illegible]
within a short [illegible]
given notice of trains [illegible]
depots were isolated. [illegible]
would not only [illegible]

depots, but would have been an attempt to prove freedom from negligence by showing similar conduct of others, which conduct of others might also constitute negligence. We agree that the offer of proof did not pretend to show that the conditions which existed around the other stations with respect to hoboes and vagrants were similar to the conditions on and about the 137th Street Station. We are of the opinion that the court was right in excluding the proffered testimony.

Defendant maintains that the court erred in refusing to give instructions 1 and 2 tendered by it, which read:

"1. You are instructed that the defendant Illinois Central Railroad Company was under no duty to provide alarms or signal devices for the use of passengers on the platform and in the waiting room in question.

"2. The jury are instructed that under the facts proved in this case the defendant Illinois Central Railroad Company was under no duty to keep either a ticket agent or any other employee continuously on duty on the platform in question at the time of the occurrence complained of."

In our opinion the court did not err in refusing to give these two instructions. Defendant also urges that the court erred in giving instruction 4, which reads:

"4. The court instructs the jury that the defendant, Illinois Central Railroad Company, must use such care to discover and prevent danger to its passengers as an ordinary prudent person would under the same or similar circumstances. It is the duty of the defendant to protect its passengers from all dangers from whatever source arising in, at, or on its station, waiting room and platform of which it had knowledge or which, in the exercise of due care and diligence it would reasonably anticipate and provide against."

Defendant states that the requirement of protection "from whatever source" makes defendant a practical insurer and imposes a greater burden on it than does the law, and that the record contains no evidence that would charge the defendant with knowledge of or enable it to reasonably anticipate the unlawful act. This instruction does not make the defendant a practical insurer. The instruction states that the defendant need use only such care as "an ordinary prudent person" would under the same or similar circumstances. In addition to plaintiff's instruction No. 4, the court gave plaintiff's instruction

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

preferred testimony.

[illegible]

give instruction [illegible]

"[illegible]

Central [illegible]

signal device [illegible]

the waiting room [illegible]

"[illegible]

in this case the [illegible]

under no duty to [illegible]

continuously on [illegible]

the occurrence [illegible]

In our opinion [illegible]

instructions [illegible]

instruction [illegible]

"[illegible]

Illinois [illegible]

and never [illegible]

would [illegible]

the [illegible]

over [illegible]

platform of which [illegible]

care and [illegible]

against."

Defendant [illegible]

counsel [illegible]

[illegible] on it [illegible]

evidence that would [illegible]

it to reasonably [illegible]

not make the [illegible]

that the defendant [illegible]

[illegible]

to plaintiff's instruction [illegible]

No. 6 and defendant's instruction No. 10, all referring to ordinary care. Defendant's instruction No. 10 stated: "If you find from the evidence that defendant's platform and approaches * * * were being operated, lighted and maintained with ordinary care and with reasonable regard to the rights and safety of the property and person of all other persons, including plaintiff, then and there present, then your verdict should be for the defendant." We are of the opinion that instruction No. 4 was proper and in accordance with the Supreme Court opinion in the instant case. Defendant complains of plaintiff's instruction No. 5 reading:

> "The court instructs the jury that it is not necessary in order to create the relationship of a carrier and passenger, that the plaintiff should have entered a train of the defendant, but if you believe from the evidence that on the morning of the 6th day of September, 1938 plaintiff was at the place provided for by the defendant for its passengers at its 137th Riverdale, Illinois station, waiting room and platform, with the intention of taking passage on one of the trains of the defendant and having a ticket, she was a passenger of the defendant and was entitled to all the rights and privileges of a passenger."

Defendant states that the vice of this instruction is that the court tells the jury plaintiff is entitled "to all the rights and privileges of a passenger" and then fails to tell the jury, either in this instruction or any other instruction, what those rights and privileges are; that this is particularly vicious in view of the statement of plaintiff's counsel during the voir dire examination of the jurors that "it is well known that a railroad company is under a duty to its passengers to exercise the greatest degree of care consistent with the practical operation of the road," and that this erroneous statement was accentuated by the court in refusing to entertain the objection of defendant, based upon the position of the Supreme Court in Davis v. South Side Elevated R. R. Co., 292 Ill. 378, that a distinctly different measure of care was applicable. On the voir dire examination the prospective jurors were informed by the attorney for plaintiff that the court, not counsel, would instruct them as to the law. It is true that this instruction does not define all the rights and

No. 6 and defendant's instruction No. 10, [illegible]

ners. Defendant's instruction No. 10 is as: [illegible]

the evidence that defendant's [illegible]

being operated, [illegible]

reasonable regard to the [illegible]

person of all other persons, [illegible]

present, then your verdict must be for the defendant.

the opinion that instruction [illegible]

the instruction [illegible]

of plaintiff's instruction No. 3 reads:

"The court instructs the jury [illegible]

order to create the relationship of [illegible]

the plaintiff would be [illegible]

you believe from the evidence [illegible]

of September, 1928 plaintiff [illegible]

defendant for its passenger [illegible]

waiting room and platform, [illegible]

one of the trains of the defendant [illegible]

passenger of the defendant [illegible]

privileges of a passenger."

Defendant states that the [illegible]

tells the jury plaintiff [illegible]

of a passenger [illegible]

instruction or any other instruction [illegible]

are; that this is mandatory [illegible]

plaintiff's counsel [illegible]

that "it is well known [illegible]

passengers to [illegible]

practical door [illegible]

was accentuated [illegible] the court in [illegible]

of defendant, [illegible]

v. South Side [illegible]

different meanings [illegible]

the prospective jurors were [illegible]

that the court, not counsel, would [illegible]

is true that this instruction [illegible]

privileges of a passenger. It is the law that in the operation and maintenance of its stations and platforms, defendant owed to her only a duty of ordinary care while she was a passenger. The jury knew that at the time of the assault plaintiff was not on a train and they were fully instructed that the defendant owed only the duty of ordinary care. It would have been better to have left out the phrase "that plaintiff was entitled to all the rights and privileges of a passenger." However, we find that the jury was fully instructed and that this phrase was not prejudicial to the defendant. Defendant also complains of instruction No. 9, reading:

"9. You are instructed that if you believe the plaintiff has proved by the preponderance or greater weight of the evidence, under the instructions of the court, that the defendant was guilty of negligence in the management and operation of its railroad station at 137th and 138th Streets, Riverdale, Illinois, as charged in the plaintiff's complaint and amendment thereto, and that the plaintiff was then and there and at all times prior thereto in the exercise of ordinary care for her own safety, and that as a direct and proximate result and in consequence of the negligence of the said defendant, if any, as charged in the bill of complaint, the plaintiff sustained injuries as alleged in her said amended complaint, then you should find the said defendant guilty."

Defendant maintains that the instruction permits recovery for negligence charged in the complaint, even though such negligence was not shown by the evidence in the case, and that this was highly prejudicial in view of the several charges of negligence, on which charges there was absolutely no evidence in the case. The first sentence of the instruction tells the jury that "if you believe the plaintiff has proved by a preponderance or greater weight of the evidence, under the instructions of the court, * * *." From this instruction the jury would understand that the burden was on the plaintiff to prove the charges of the complaint by a preponderance or greater weight of the evidence. We do not believe that the jury would understand that they could find for the plaintiff merely because the negligence was charged without being proved.

Because of these views, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY, J. CONCURS.
HEBEL, P.J. TOOK NO PART.

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321 I.A. 326

A

C. E. SMALLEY,

Appellant,

v.

JOHN S. LORD, Agent in fact for Underwriters at Lloyd's, London,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

310 2 310

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

A statement of claim filed by C. E. Smalley in the Municipal Court of Chicago against John S. Lord, Agent in fact for Underwriters at Lloyd's, London, alleges that prior to March 17, 1941 the Underwriters at Lloyd's, London, issued a policy to plaintiff insuring him against loss by fire or theft in the ownership of a Dodge truck tractor, for the actual value thereof; that plaintiff paid premiums of $239.85 and $9.55 to J. M. Hogle Agency, Inc., Chicago, for the policy; that on March 17, 1941 the truck tractor was stolen from the premises where it was stored at 6900 South State Street, Chicago; that it had not been recovered; that the actual value of the truck tractor at the time of the theft was $885; that on May 15, 1941 plaintiff submitted his proof of loss to J. M. Hogle Agency, Inc., and Paul F. Jones, Director Insurance of the State of Illinois, as agent for the Underwriters; that as soon as plaintiff learned of the theft he notified the police department and complied with all the regulations concerning notice and proof of loss provided by the policy; that the Underwriters, through their adjusters, Toplis and Harding, denied liability for the loss; and that by such denial they waived all technical requirements of the policy such as notice and proof of loss. Plaintiff asked judgment for $885. Defendant answering, admitted the issuance of the policy, but denied all other allegations.

G. E. BAILEY,

Appellant,

v.

JOHN S. LOPD, Agent in fact for Underwriters at Lloyd's, London,

Appellee.

The case was tried by the court without a jury, resulting in a finding and judgment against plaintiff. He appeals and asks that the judgment be reversed and that judgment be entered in his favor, or in the alternative that the judgment be reversed and that the cause be remanded for a new trial.

Plaintiff asserts that the denial of liability by an insurer, made during the period prescribed by the policy for the presentation of proof of loss, and on grounds not relating to the proof, will be considered as a waiver of the provision of the policy requiring sworn proof to be presented. Plaintiff urges that it proved the allegations of the statement of claim and that it is entitled to judgment. Defendant answers that the provision of the policy requiring the plaintiff to furnish proof of loss was a condition of liability; that failure to comply therewith precludes plaintiff from any recovery; that any denial of liability by the insurers after the expiration of 60 days during which plaintiff was required to furnish proof of loss, did not operate as a waiver of the condition of the policy requiring such proof of loss; and that even if there had been a waiver of the provision requiring proof of loss, there was no proof that the insured vehicle had been stolen or taken without the knowledge or consent of the plaintiff. The parties agree that the policy was in effect at the time the vehicle is alleged to have been stolen. The policy required that a sworn proof of loss be furnished the insurer within 60 days after the loss. The proof of loss sent to the defendant and introduced in evidence as plaintiff's exhibit No. 4, was neither signed or sworn to by plaintiff. Instead, plaintiff's purported signature was affixed to the document by one of plaintiff's attorneys and this signature was then notarized by another of plaintiff's attorneys, who knew the document had not been signed or sworn to by plaintiff. This supposed proof of loss is dated May 11, 1941

The case was tried by the court without jury, resulting in a finding and judgment against plaintiff. By [illegible] the judgment be reversed and that judgment be entered in his favor, or in the alternative that the judgment be reversed and that the cause be remanded for a new trial.

Plaintiff asserts that the denial of liability by an insurer, made during the period prescribed by the policy for the presentation of proof of loss, and on grounds not material to the proof, will be considered as a waiver of the provision of the policy requiring such proof to be presented. Plaintiff cites [illegible] the allegations of the statement of claim and that it is a fact to be judged.

Defendant answers that the provision of the policy requiring the plaintiff to furnish proof of loss was a condition of liability; that failure to comply therewith precludes plaintiff from any recovery; that any denial of liability by the insurer after the expiration of 60 days during which plaintiff was required to furnish proof of loss, did not operate as a waiver of the condition of the policy requiring such proof of loss; and that such [illegible] have been a waiver of the provision requiring proof of loss. There was no proof that the insured vehicle had been stolen or taken without the knowledge or consent of the plaintiff. [illegible] that the policy was in effect at the time [illegible] the vehicle.

The policy required that a proof of loss be furnished the insurer within 60 days after the loss. The proof of loss [illegible] the defendant and introduced in evidence as a statement [illegible] No. 4, was neither signed or sworn to by plaintiff. However, [illegible] unsworn statement was affirmed to be a document by the plaintiff's attorney and this statement was then introduced [illegible] plaintiff's attorney, who knew the document was not [illegible] to by plaintiff. This proposed proof of loss [illegible]

and states the date of the alleged theft as March 17, 1941. The law is well settled in this State that where an insurance company expressly denies its liability under a policy of insurance before the expiration of the time for furnishing the proof of loss required by the policy, and on grounds not relating to the proof, the furnishing of such proof of loss by the assured is thereby waived. Dvorak v. Hartford Fire Insurance Co., 253 Ill. App. 76. However, this rule has no application to a case where it is sought to show a waiver of proof of loss by a denial of liability made after the time for furnishing such proof of loss has expired. "The doctrines of waiver and estoppel are fundamentally equitable doctrines and are based upon the principle that it would be wrong to permit an insurer to insist upon a forfeiture after it has induced the insured to alter his position to his prejudice, or to do or omit to do anything he would have otherwise done; * * * but in the absence of such circumstances and after the time for submitting proofs has expired, an insurance company may rely on a failure to furnish proofs of loss although it may have denied liability on some other ground." Buysse v. Connecticut Fire Insurance Co., 240 Ill. App. 324.

George W. Hansen one of plaintiff's attorneys testified that he operates the Triangle Finance Company; that he owned the tractor; that he sold it to plaintiff on May 8, 1940 on a conditional sales contract; that he saw the tractor the early part of March, 1941 at the premises of the Triangle Auto Radiator Company, 6900 South State Street, Chicago; that it was then in good running condition; that it was worth $400 in March, 1941; that he did not see the tractor thereafter; that following the early part of March, 1941 he went to the premises where the tractor had been stored; that the tractor was not there; that he called plaintiff by long distance telephone and asked

and states the date of the alleged [illegible] (p. 117). The law is well settled in this [illegible] expressly denies its liability under [illegible] the expiration of the time for [illegible] by the policy, and on demand [illegible] ing of such proof of loss by the [illegible] v. Hartford Fire Insurance Co., [illegible] rule has no application to a case where [illegible] of proof of loss by a denial of liability [illegible] furnishing such proof of loss has [illegible] and estopped are fundamentally analogous [illegible] the principle that it would be [illegible] upon a forfeiture after it was [illegible] position to his prejudice, or to do or [illegible] have otherwise done; " " " but in the [illegible] and after the time for performing [illegible] company may rely on a failure to [illegible] it may have denied liability on some [illegible] Fire Insurance Co., [illegible].

George V. Hansen one of plaintiff's [illegible] be operated the Triangle Theater [illegible] that he sold it to plaintiff on [illegible] contract; that he saw the theater [illegible] the premises of the Triangle [illegible] Street, Chicago; that it was [illegible] was worth $400 in March, 1921; that he did not see the [illegible] after; that following the early [illegible] premises where the theater had been [illegible] there; that he called plaintiff by long [illegible] and asked

new page

plaintiff if he had sent for the tractor or had someone get it, but that plaintiff said "no." On motion of defendant the testimony as to the telephone conversation was stricken. Witness testified further that he advised the triangle people to report the tractor "missing" to the 15th District Police Station at 64th and Wentworth Avenue, Chicago; that he, witness, notified defendant by telephoning to a Mr. Kuhlman, an insurance agent who writes policies for the W. H. Hogle Agency, Inc.; that Mr. Kuhlman was the insurance broker in the transaction; that thereafter witness talked to the adjuster for defendant, Mr. Erieson; that witness called Mr. Erieson or the latter called him; that Mr. Erieson told him he wanted to see plaintiff; that witness then told Mr. Erieson about his telephone conversation with plaintiff; that he told Mr. Erieson that plaintiff had not sent for the tractor, and informed Mr. Erieson that as soon as plaintiff got in town he would arrange for him to see Mr. Erieson; that plaintiff came to Chicago and witness sent him, with witness's brother, to the 15th District Police Station; that witness attempted to see Mr. Erieson, but could not do so because the latter [illegible]; that witness talked to Mr. Erieson the [illegible] him what he was going to do on plaintiff's loss; that Mr. Erieson said: "I am not going to pay the loss because [illegible] and we deny liability"; that witness communicated [illegible] and told him to communicate with the company [illegible] see if he could settle the loss; that shortly before the [illegible] was up witness was informed by Mr. Kuhlman [illegible] denying liability and would not pay. Witness [illegible] proof of loss dated May 11, 1941, purporting to be signed [illegible] "Quality" and subscribed and sworn to before Charles [illegible] Hansen. It was conceded that this proof of loss was delivered to defendant. The original was produced by defendant's attorney. Witness testified further that he prepared the proof of loss; that he called plaintiff by telephone and

reported Mr. Ericson's and Mr. Kuhlman's conversation to him. The proof of loss was received in evidence. At that time defendant announced that he questioned the date on which the proof of loss was sent. The proof of loss states that on March 17, 1941 the tractor was stolen from the premises where it was stored at 6900 South State Street, Chicago, and has not since been recovered; that the actual value of the tractor on the date of the theft was $385; and that he made a claim for $385. Witness further testified that he signed Mr. Smalley's name to the proof of loss. Asked as to what conversation, if any, he had with Mr. Ericson prior to May 15, 1941 regarding the settlement, witness answered: "I talked to Mr. Ericson and he said he had the proof"; that he talked to Mr. Ericson, with whom he had talked before, regarding "this loss and a dozen other losses"; that "Mr. Ericson said he wasn't going to pay out on this claim; he was taking the same position that he had taken on it from the start; and I told him that I tried to get Mr. Smalley and he together, but that when Mr. Smalley was in town he was only here over night and that he was out of his office and I was not able to bring the two of them together. I told him that I signed that proof of loss after calling Mr. Smalley long distance and being authorized to do so; that I mailed a copy to Mr. Smalley and got the copy signed by Mr. Smalley, and that I would give him a copy signed by Mr. Smalley if he wanted me to. He said: 'You don't have to give it to me because we are not going to pay,' and that conversation took place in the early part of May, prior to the running out of the sixty days, some place between the 11th and 13th of May". The court then received in evidence a copy of the "proof of loss". This copy was signed by plaintiff and is the copy which witness states he offered to give to Mr. Ericson in the conversation between May 11th and 13th, 1941. On cross-examination, George F. Hansen testified that the conversation with Mr. Ericson in which he spoke of the proof of loss,

reported Mr. Frisson's and Mr. Smiley's conversation to him. The proof of loss was received in evidence. [illegible] announced that he questioned the date [illegible] was sent. The proof of loss [illegible] tractor was stolen from the [illegible] South State Street, Chicago, [illegible] the actual value of the tractor [illegible] that he made a claim for [illegible] signed Mr. Smiley's name to the proof of loss. [illegible] conversation, if any, he had with Mr. [illegible] regarding the settlement, witness replied: [illegible] and he said he had the proof; that he talked to Mr. Frisson, with whom he had talked before, regarding this loss [illegible] Issaee"; that "Mr. Frisson said he wanted [illegible] claim; he was taking the loss [illegible] the start; and I told him that I [illegible] together, but that when Mr. Smiley [illegible] over night and that he was out of [illegible] bring the two of them together. [illegible] of loss after calling Mr. Smiley [illegible] to do so; that I mailed a copy [illegible] by Mr. Smiley, and that I would [illegible] if he wanted me to. He said: [illegible] because we are not going to [illegible] in the early part of May, prior to the [illegible] zone place between the 11th and 15th [illegible] received in evidence a copy of the [illegible] signed by plaintiff and in the [illegible] to give to Mr. Frisson in the [illegible] 1941. On cross-examination, [illegible] conversation with Mr. Frisson to write [illegible]

was between May 11th and May 16th; that he did not know the exact date; that it was prior to the expiration of the 30 days; that witness was the owner of the Triangle Finance Corporation; and that he was a law partner of his brother, who was trying the case. Mr. W. W. Kuhlman, called by plaintiff, testified that he was an insurance broker; that he was the broker who procured the policy on the tractor; that he received a report of the loss of the tractor from Mr. Hansen; that he then telephoned the J. M. Boyle Agency and reported the loss; that he received a call later inquiring as to the status of the loss; that he called the adjusters, Forlis and Harding, and inquired of them as to the status of the loss; that he talked to Mr. Ericson regarding the loss; that Mr. Ericson "set forth the statement that the loss was going to be declined because of - because he doubted that there was a loss. In other words, he questioned - he thought there was some fraud involved." Witness was asked as to whether he knew the date of his conversation with Mr. Ericson and he answered, "Gee, I don't. About a year and a quarter ago, about fifteen, sixteen months ago." Mary Tawson, called by plaintiff, testified that she and her husband operated the business known as the Triangle Auto Radiator at 6900 South State Street; that she knew plaintiff; that a mechanic by the name of Bob delivered the tractor to their lot at the southwest corner of State and 60th Streets; that it was the Dodge tractor; that it was delivered some time in the month of February, 1941. Asked as to how often she saw it, she answered: "Well, I saw it every day". Asked: "Until what date?", she answered: "Well, March 17th. That morning when we came to work, my husband and I, it was not there, so I called up the Triangle Finance Company to find out whether they had taken it off and they said no". Witness further testified that she reported the loss; that she went to the Englewood Police Station and made a report; that she gave

was between May 1st and [illegible]; that [illegible]
date; that it was going to the exchange [illegible]
witness was the owner of the [illegible]
be, as a jew [illegible]
Mr. A. Rubinsen, called by [illegible]
insurance broker; that he was [illegible]
the tractor; that he received a [illegible]
from Mr. Hansen; that he [illegible]
reported the loss; that [illegible]
the status of the loss; that [illegible]
Martin, and [illegible]
talked to Mr. [illegible]
forth the statement [illegible]
of - because he doubted [illegible]
questioned - he thought [illegible]
asked as to whether he [illegible]
Tripson and he answered, [illegible]
ago, about fifteen, [illegible]
plaintiff, testified [illegible]
known as the "Passaic Juice [illegible]
the time plaintiff; that [illegible]
tractor to their lot at the [illegible]
that it was the "Duke tractor; [illegible]
month of February, 1941. [illegible]
answered: "well, I saw it [illegible]
she answered: "well, Mrs. [illegible]
my husband and I, it was [illegible]
Finance Company to find out [illegible]
no". Witness further testified [illegible]
went to the Bulevard [illegible]

the motor and serial number; that the police officer told her she couldn't sign anything, that she would have to have Mr. Swalley "report this"; that the police came over "to our lot and they checked"; that if she "remembered correctly" she saw the tractor on March 15th or 16th and that it was in running shape. Charles P. Hanson, one of the attorneys for plaintiff, testified that he saw plaintiff in the month of March, 1941; that he came to witness's office about a week after March 17, 1941, in response to a letter written to him by the Triangle Finance Company advising him that it would be necessary for him to come to Chicago as soon as possible and sign the book at the police station so that the "police report of the theft could be completed in accordance with the requirements of the police department"; that witness took plaintiff in his car and drove to the Englewood Police Station at 64th and Wentworth Avenue and filled out a report; that witness "believed" the report was filled out showing the date as March 17, 1941; that plaintiff signed the report in witness's presence; that witness and plaintiff went back to the office of the Triangle Finance Company "and called up Mr. Ericson and told him that plaintiff was in town and asked Mr. Ericson if he wanted to make an appointment with plaintiff; that Mr. Ericson said he did not know just exactly how soon he could make an appointment, but that he would try and make an appointment and would call back, but he never called back"; that witness "believed" he talked to Mr. Ericson again around the first of May and that at that time Mr. Ericson said "he was not going to pay"; that "they were not going to honor the loss and were not going to pay". Witness testified further that there were several other policies issued at Lloyd's of London in which Mr. Ericson was the adjuster then pending about which he talked to Mr. Swanson at that time; that every highway tractor and trailer "that we financed" on which an insurance policy was written, "was written by defendants because they were the only insurance company who insured highway or long distance freight

the motor and aerial motor; [illegible]

county's sign ordinance, [illegible]

"report 'bill'; that the police [illegible]

that if the "[illegible]" [illegible]

or 15th and that it was in [illegible]

the attorney for "[illegible]" [illegible]

month of "good" 1981; that [illegible]

after March 17, 1981, in response to [illegible]

Triangle Finance [illegible]

him to come to [illegible]

police station so that the "police report" [illegible]

complained in [illegible]

that witness from [illegible]

Police Station at 8th and [illegible]

that witness "believed" the [illegible]

March 17, 1981; that [illegible]

that witness and plaintiff [illegible]

Finance Company [illegible]

was in town and [illegible]

with plaintiff; that [illegible]

how soon he could [illegible]

an appointment and would [illegible]

witness "believed" he talked to [illegible]

May and that at that time [illegible]

that "they were not going to [illegible]

witness testified further that [illegible]

at Lloyd's or [illegible]

question about which [illegible]

Highway Director and [illegible]

policy was written, "was written by [illegible]

only insurance [illegible]

road vehicles". Witness stated that the last time he saw the Dodge tractor was the early part of March, 1941 at the Triangle Auto Radiator lot. George Walter, called by defendant, testified that he was a handwriting expert and that a statement purporting to be signed by plaintiff at Cleveland, Ohio on June 18, 1941 bore the signature of plaintiff. Plaintiff's attorney on being shown this statement, admitted that it bore the signature of plaintiff. It was then received in evidence without objection. This statement reads, in part, that "On or about the middle of February, 1941 driver Williams parked this tractor in a parking lot on 59th Street near State Street, Chicago, Ill., as I had no further use for the tractor. On or about March 1st I learned that the tractor had been stolen from the parking lot and to date, June 18, 1941, no recovery has been made. I reported the theft on or about March 1st to the Chicago Police Department at the Precinct Station in the vicinity of 63rd Street and Wentworth, Chicago, Ill., thinking that by reporting the theft to the police that this would be all that was necessary to prove the claim to my insurance company". The trial judge stated: "The court is quite impressed with the evidence of Mrs. Dawson that that truck was delivered and was there and was on her premises."

The trial judge commented on the failure of plaintiff to testify and on plaintiff's admission in the statement signed at Cleveland on June 18, 1941 that he had not filed a claim for the loss of the tractor. The court felt that this statement controlled the decision of the case. There was competent testimony that the Dodge tractor covered by the policy was stored at the lot owned by Mr. and Mrs. Dawson at 69th and State Streets; that it was there from the middle of February, 1941 until March 16, 1941 and that it was missing from and after March 17, 1941. Mrs. Dawson reported the loss to the police station and was told that the report would have to be signed by the plaintiff. Mr. George W. Hansen testified that he saw the tractor at the lot the early part of March, 1941; that he advised the Triangle

road vehicles". [illegible] stated that [illegible]
tractor was the early part of March, [illegible]
Radiator Lot. Some months later, [illegible]
was a handwriting expert and that [illegible]
by plaintiff at Cleveland, Ohio on June [illegible]
of plaintiff. Plaintiff's attorney [illegible]
admitted that it bore the signature [illegible]
in evidence without objection. [illegible]
"On or about the middle of February, [illegible]
tractor in a parking lot on 90th Street [illegible]
as I had no further use for the tractor [illegible]
learned that the tractor had been stolen [illegible]
date, June 18, 1941, no recovery [illegible]
on or about March 1st in the [illegible]
Freeport Station in the vicinity of [illegible]
Ill., thinking that by reporting [illegible]
would be all that was necessary to [illegible]
company". The trial judge stated: [illegible]
the evidence of the "seven [illegible]
and was on her premises."

The trial judge concerned [illegible]
testify and on plaintiff's [illegible]
Cleveland on June 18, 1941 [illegible]
of the tractor. The court [illegible]
decision of the case. [illegible]
tractor covered by the policy [illegible]
Mrs. Bevson at 6th and [illegible]
middle of February, 1941 until [illegible]
from and after March 18, 1941. [illegible]
police station and was told that the [illegible]
the plaintiff. Mr. [illegible] [illegible]
at the lot the early part of March, [illegible]

people to report that it was missing; that he notified defendant by calling Mr. Kuhlman; that thereafter he talked to Mr. Ericson; that prior to May 17, 1941 and within the 60 day period he talked to Mr. Ericson, defendant's agent, and that the latter told him he wasn't going to pay the claim; that he talked to Mr. Ericson in the early part of May, 1941 and that Mr. Ericson said he was not going to pay the loss because "we think it's phoney and we deny liability". The testimony of Mr. Kuhlman is corroborative of the testimony of Mr. George W. Hansen. Mr. Kuhlman testified that he talked to Mr. Ericson regarding the loss and that Mr. Ericson stated that the loss was going to be declined because he doubted that there was a loss. Mr. Charles P. Hansen testified that about a week after March 17, 1941 plaintiff came to their office in response to a letter advising him it would be necessary for him to sign the book at the police station; that they went to the police station and filled in the report, showing the loss as having occurred on March 17, 1941; that he endeavored to talk to Mr. Ericson while plaintiff was in town, but was not able to do so; that around the first part of May he again talked to Mr. Ericson and that the latter informed him that he was not going to pay the claim. Defendant urges that the testimony of the two attorneys for plaintiff "should be regarded in the light of their conduct in fabricating a proof of loss to which one of the attorneys signed the plaintiff's name and on which the other attorney falsely certified under his notarial seal that the document had been signed and sworn to before him by plaintiff", and that their testimony should also be regarded in the light of the decisions which hold that an attorney who assumes the burden of witness while representing his client in a lawsuit does so at a very great detriment to the credibility of his testimony, and that little weight is to be given to the testimony of an attorney who takes the stand under such circumstances. Crescio v. Crescio, 385 Ill. 393, 400; Benince v. Nardiello,

people to prevent that it was [illegible]; but the [illegible]
calling Mr. Tuhlman; that [illegible]
prior to May 17, 1941 and [illegible]
Mr. Tilson, defendant's agent, [illegible]
going to pay the claim; that he talked to [illegible]
part of May, 1941 and that Mr. Tilson [illegible]
the loss because he thinks it's [illegible]
The testimony of Mr. Tuhlman is [illegible]
Mr. George W. Bowen. Mr. Tuhlman [illegible]
Mr. Tilson regarding the loss and that [illegible]
loss was going to be declined because [illegible]
Mr. Charles E. Bowen testified that about a week [illegible]
1941 plaintiff came to their office in [illegible]
him it would be necessary for him to give the [illegible]
station; that they went to the police station [illegible]
showing the loss as having occurred on [illegible]
endeavored to talk to Mr. Tilson [illegible]
not able to do so; that around the [illegible]
to Mr. Tilson and that the letter [illegible]
to pay the claim. Defendant [illegible]
attorneys for plaintiff [illegible]
conduct in [illegible]
signed the plaintiff's [illegible]
certified under his notarial [illegible]
and sworn to before him by plaintiff [illegible]
should also be regarded in the light of the [illegible]
an attorney who answers the inquiry of [illegible]
client in a lawsuit does so at a very great [illegible]
credibility of his testimony, and [illegible]
the testimony of an attorney who takes the [illegible]
witnesses. Cresenzo v. Tresolo, [illegible] 111, 204, [illegible]: [illegible] v. [illegible]

320 Ill. 181, 185. Plaintiff did not rely entirely upon the allegation that a proper proof of loss had been made. Paragraph 4 of the statement of claim alleged that defendant denied liability for the loss and thereby waived the requirements of the policy concerning proof of loss. It is true that the proof of loss was signed with the name of plaintiff and that this was not his signature. It is also true that plaintiff did not make oath to the proof of loss, as it purported to show. George M. Hansen and Charles P. Hansen gave a satisfactory explanation concerning the signature and oath to the proof of loss. The only testimony received on the part of defendant was the statement signed by plaintiff at Cleveland on June 18, 1941, in which he states that about the middle of February, 1941 the tractor was parked in a lot at 69th Street near State Street, Chicago, that on or about March 1st he learned that it had been stolen from the parking lot and that he did not present a claim. It is interesting to observe that the proof shows that the tractor was parked at 69th and State Streets. We are satisfied that the plaintiff proved that the vehicle was stolen on March 17, 1941. The trial judge said he was impressed with the testimony of Mrs. Sawson. She went to the Englewood Police Station and made a report of the loss on March 17, 1941 or shortly thereafter. About a week after March 17, 1941 plaintiff, accompanied by Mr. Charles P. Hansen, went to the police station and signed a report of the loss, stating that such loss occurred on March 17, 1941. Plaintiff did not testify. The statement of June 18, 1941 is an admission against interest. Despite his admission that he learned of the loss on or about March 1, 1941, we find that plaintiff proved by a preponderance of the evidence that the loss occurred on March 17, 1941 and that the Underwriters, through their agents, denied liability within 30 days after the loss and on grounds not relating to the proof of loss. The evidence shows that the reason the Underwriters refused to pay the loss was that they felt that the claim was fraudulent. In our opinion the judgment should be

320 Ill. App. 181, 188. Plaintiff did not rely solely upon his allegation that a proper proof of loss had been made. [illegible] of the statement of claim alleged that defendant [illegible] for the loss and thereby waived the requirements of the policy concerning proof of loss. It is true that [illegible] aligned with the case of plaintiff and [illegible]. It is also true that plaintiff did not rely solely on the proof of loss, as it supported to show. [illegible] Bergen gave a satisfactory explanation concerning the absence of oath to the proof of loss. The only testimony regarding on the part of defendant was the statement alleged by plaintiff [illegible] June 18, 1941, in which he states that upon the night of January, 1941 the trector was passed [illegible] Chicago, that on or about March 1st he learned that it had been stolen from the parking lot and that he did not present a claim. It is interesting to observe that the proof shows that the [illegible] parked at 67th and State Streets. [illegible] proved that the vehicle was stolen on March 17, 1941. [illegible] said he was impressed with the testimony of [illegible] to the Englewood Police station one [illegible] March 17, 1941 or shortly thereafter. [illegible] 1941 plaintiff, accompanied by Mr. [illegible] police station and signed a report [illegible] occurred on March 17, 1941. [illegible] ment of June 18, 1941 is an [illegible] admission that he learned of the loss [illegible] find that plaintiff proved by a preponderance of the evidence the loss occurred on March 17, 1941 [illegible] their agents, denied liability within [illegible] grounds not relating to the proof of loss. The evidence shows that the reason the Underwriters refused to pay [illegible] that the claim was fraudulent. In our opinion the judgment should

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reversed and the cause remanded for a new trial. It would be a small matter to obtain the original or a copy of the report of the loss said to have been made at the Englewood Police Station a few days after the occurrence. Perhaps at that time plaintiff will be available to testify. It is interesting to observe that although the testimony of George W. Hansen that he called plaintiff by long distance telephone and asked him if he had sent for the tractor or had someone get it, to which inquiry plaintiff said "No," was stricken, the statement made at Cleveland on June 18, 1941 and introduced as defendant's exhibit No. 1, is designated as a "Statement of Loss"; that it recites that on or about March 1st he learned that the "tractor had been stolen from the parking lot" and that to the date of making the statement no recovery had been made; that he reported the theft on or about March 1st to the Chicago Police Department; that up to that time he had not filed any claim with any insurance company for the loss of the tractor, nor had he delegated anyone else to do so; [illegible] aware the tractor was still missing; [illegible] of the tractor he made no payments [illegible].

In evaluating the testimony of [illegible] plaintiff, we have had in mind the [illegible] the burden of witness while representing a client in a lawsuit [illegible] so at a very great detriment to the credibility [illegible] evidence. Nevertheless, we feel that the narrative [illegible] and circumstances in evidence [illegible] the attorneys. We note that at the trial [illegible], one of the attorneys for plaintiff, [illegible] intervene in the case under the trade name of [illegible]. It is strange that plaintiff did not [illegible] with his attorneys in presenting his case. It is elementary that the attorneys in a suit are appointed by the client and that if the client does not wish to commence or prosecute a case the attorneys cannot do so against his

new page

wishes. On the other hand, if the attorneys for the plaintiff have an interest in the case as individuals, separate and distinct from their duties as attorneys and are able to show this interest, we do not know of any reason why they may not be made parties to the case.

On June 29, 1943 defendant (appellee) moved to dismiss the appeal, or in the alternative to strike the report of proceedings. Counter-suggestions were filed. After due consideration both motions were denied on July 1, 1943.

For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY, J. CONCURS.

HEBEL, P.J. TOOK NO PART.

wishes. On the other hand, if the attorneys for the plaintiff have an interest in the case as individuals, respects and differs from their duties as attorneys and are able to show this fact first, we do not know of any reason why they may not be a witness in the case.

On June 29, 1942 defendant (appellee) moved to dismiss the appeal, or in the alternative to strike the report of proceedings. Counter-suggestions were filed. After due consideration both motions were denied on July 1, 1942.

For the reasons stated, the judgment of the municipal Court of Chicago is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND REMANDED WITH DIRECTIONS.

KILEY, J. CONCURS.

HEBEL, P.J. TOOK NO PART.

42704

JAMES WITKOWSKY, OLGA WOOLF and LEON HARTMAN,	)	
Appellees (Cross Appellants)	)	APPEAL FROM
v.	)	CIRCUIT COURT
THE RAVISLOE COUNTRY CLUB, a corporation organized not for pecuniary profit,	)	COOK COUNTY.
Appellant (Cross Appellee).	)	

32 I. A. 126

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MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 28, 1941 James Witkowsky and Olga Woolf sued the Ravisloe Country Club, a corporation organized not for pecuniary profit, on alleged certificates of indebtedness dated October 1, 1917. On January 29, 1942 Leon Hartman was joined as coplaintiff and an amendment to the complaint was filed. The complaint, as amended, averred that on October 1, 1917 the club, being indebted in the aggregate principal amount of $132,925.00, pursuant to resolutions adopted at a special meeting of the members held on June 19, 1916, for good and valuable consideration, made, executed and delivered a series of "certificates of indebtedness", issued in denominations of $500.00, $100.00, $50.00 and $25.00; that in each of these certificates the club acknowledged itself to be indebted to the holder in the face amount and promised to pay to the holder at Foreman Bros. Banking Company, Chicago, the face amount of the certificate in twenty successive equal annual installments commencing October 1, 1918, without interest prior to maturity; that James Witkowsky is the holder of four of the certificates, one for $500.00, two for $100.00 each and one for $50.00; that Morris Woolf was the holder of four certificates; that he died a resident of Chicago on January 29, 1940, leaving a last will and testament naming Olga Woolf as executrix and sole legatee

42704

JAMES WITKOWSKY, [illegible]
LEON BAYERAK,

Appellees (Cross Appellants)

v.

THE RAVISLOE COUNTRY CLUB, a corporation
organized not for pecuniary profit,

Appellant (Cross Appellee).

W. Judgments [illegible]

On July 20, 1921 [illegible] Ravisloe Country Club, a corporation [illegible] pecuniary profit, on alleged [illegible] 1917. On January 20, 1921 [illegible] and an amendment [illegible] amended, averred that [illegible] in the amendments [illegible] adopted at a special meeting [illegible] good and valuable consideration [illegible] of "certificates of membership" [illegible] $100.00, $80.00 and $50.00; [illegible] club acknowledged itself to [illegible] amount and promised to pay [illegible] Company, Chicago, the [illegible] successive equal monthly [illegible] without interest [illegible] of four of the certificates [illegible] and one for $50.00; that [illegible] that he died a resident of [illegible] last will and testament [illegible]

of his estate; that the will was duly proved; that she as the distributee became the holder of four certificates of indebtedness, each in the amount of $500.00; that Leon Hartman is the holder of six certificates, two in the amount of $500.00 each, and four in the amount of $100.00 each. The club paid coupons 1 to 14 inclusive as they matured in the years 1918 to 1931. The total installment payments thus aggregated 70% of the principal amount. The club failed to pay coupon 15, due October 1, 1932, and coupons 16 to 20 due annually thereafter up to October 1, 1937. James Witkowsky prayed judgment for $225.00, Olga Woolf for $600.00 and Leon Hartman for $420.00, plus interest from the date of maturity of each coupon to the date of judgment. Attached to the complaint was a photostatic copy of the certificates and of the unpaid coupons. Each certificate is signed, "The Ravisloe Country Club, By S. Rosenthal, President," and attested by "Edward G. Felsenthal, Secretary." The certificate reads:

"The Ravisloe Country Club hereby acknowledges itself to be indebted to the holder of this certificate of indebtedness in the sum of Five Hundred Dollars payable at Foreman Bros. Banking Company, Chicago, Illinois, without interest, under and pursuant to the resolutions adopted at a special meeting of the members of the Ravisloe Country Club, held on the 19th day of June, 1916. Said indebtedness shall be payable in twenty equal annual installments upon the presentation and surrender of the attached principal coupons as they severally become due. Payment of all of said principal coupons will extinguish said indebtedness. In Witness Thereof, The Ravisloe Country Club has caused this certificate of indebtedness to be executed in its name by its President with its corporate seal hereunto affixed duly attested by its Secretary, and said principal coupons to be signed with the facsimile signature of its Treasurer, all done this first day of October, A. D. 1917."

The coupons attached, signed by A. D. West, Treasurer, read:

"The Ravisloe Country Club promises to pay to bearer the sum of Twenty Five Dollars, on the first day of October, 1937, at Foreman Bros. Banking Company, Chicago, Illinois. This coupon represents the - - installment payable upon the principal indebtedness of the Club, evidenced by the annexed certificate of indebtedness."

On plaintiff's motion the court struck from the file the second amended answer. Defendant elected to stand on this answer and judgment was entered for James Witkowsky in the sum of $225.00, Mrs. Olga Woolf in the sum of $600.00 and Leon Hartman in the sum of $420.00. The court did not allow interest from the maturity of each coupon.

of his estate; that the will was [illegible]
distributes beside the [illegible]
each in the amount of $500.00; that [illegible]
certificates, two in the [illegible]
amount of $100.00 each. The club [illegible]
they matured in the years 1914 [illegible]
thus aggregated 70% of the [illegible]
coupon 15, due October 1, 1922, [illegible]
thereafter up to October 1, [illegible] judgment
for $229.00, plus daily [illegible]
plus interest from the date [illegible] date of
judgment. Attached to [illegible] of the
certificates and of the [illegible]
"The Savialoe Country Club, [illegible]
by "Edward C. Eisenthal, [illegible]:

"The Savialoe Country Club [illegible] to be
indebted to the holder of this certificate of [illegible] in the
sum of "Five Hundred Dollars [illegible]
Chicago, Illinois, without interest, under [illegible]
resolutions adopted at a regular meeting [illegible]
Savialoe Country Club, held on the 10th [illegible]
debtedness shall be payable in twenty [illegible]
the presentation and surrender of [illegible]
they severally become due. [illegible]
will extinguish said indebtedness. [illegible]
Country Club has caused this certificate [illegible]
executed in its name by its President [illegible]
attest duly attested by its Secretary [illegible]
to be signed with the Facsimile [illegible]
this first day of October, [illegible]

The coupons attached, signed [illegible]

"The Savialoe Country Club [illegible]
sum of Twenty "Five Dollars, on the [illegible]
Foremen Trus, Banking Corporation, Chicago, [illegible]
representing the - - Institutional [illegible]
of the Club, evidenced by the [illegible]

On plaintiff's motion the court [illegible]
answer. Defendant elected to stand [illegible]
entered for James Attorney in the sum of [illegible]
the sum of $800.00 and been [illegible]
did not allow interest from the maturity of each coupon.

Defendant appeals and plaintiff assigns cross errors because of the refusal to allow interest.

Defendant pleaded five separate defenses. The first consisted of a categorical denial of each material averment of the complaint as amended. In our opinion the "first defense" was not vulnerable to a motion to strike.

The motion to strike admits the facts well pleaded and we assume the truths of such allegations. We summarize the defenses. The second defense states in substance that the members of the club after four years of planning, decided in June, 1916 to erect immediately a new and bigger club, improvements and a swimming pool for the exclusive convenience and benefit of the members, their families and guests. The terms of the plan and agreement of the members are stated in detail. Included therein was the provision that the repayments be only made in any year when there was available net cash surplus after providing for all outside debts, maintenance and operating costs - to prevent enforced repayment of the voluntary loan and to prevent the sale or liquidation of the club. Messrs. Woolf, Witkowsky and Hartman agreed to, participated fully and joined with some 295 other members in the plan and agreement. To carry out their plan and agreement a special meeting was called solely for the purpose of considering the construction, equipment and furnishing of a new club house and to raise the balance of $100,000.00 already subscribed under the plan and agreement. In line with the plan and agreement the resolution gave the board discretion as to nature and terms of the bonds to be issued to the subscribers, omitting any interest and permitting repayment in any year when $6,000.00 was available, in such way and manner as the board may deem advisable. The club accepted the subscriptions upon the plan and agreement and not otherwise and promptly built the new club house and other improvements, and maintained them thereafter, and the plaintiffs and other members enjoyed all of its pleasures and benefits, as long as they chose to remain members. Morris Woolf became

Defendant appeals and plaintiff [illegible] cross appeals of the refusal to allow interest.

Defendant pleaded five separate defenses. [illegible] consisted of a categorical denial of each material averment of the complaint as amended. In our opinion the "[illegible]" [illegible] to a motion to strike.

The motion to strike [illegible] assume the truth of such allegations. [illegible] The second defense states in substance that [illegible] after four years of planning, [illegible] a new and bigger club, [illegible] exclusive convenience and benefit of the members, their families and guests. The terms of the plan and agreement of the [illegible] in detail. Included therein are provisions [illegible] only made in any year when there was available [illegible] providing for all outside debts, [illegible] to prevent enforced repayment of the voluntary loan and to prevent the sale or liquidation of the club. [illegible] Hartman agreed to, solicited and [illegible] members in the plan and agreement. [illegible] a special meeting was called [illegible] construction, equipment and [illegible] raise the balance of $100,000.00 [illegible] and agreement. In line with the [illegible] the board discretion as to [illegible] to the subscribers, [illegible] any year when $8,000.00 was available. [illegible] board may deem advisable. The plan [illegible] the plan and agreement and not [illegible] club house and other improvements, [illegible] the plaintiffs and other members [illegible] benefits, as long as they chose to remain members. [illegible]

and continued to be an active leader and also a member of the Board of Governors. Because of the war (World War I) and other complications, no bonds as contemplated in the resolution of 1916, were issued. However, the club records duly recorded all subscriptions, payments and repayments. For 14 years, to 1931, each board found ways and means of making repayments out of available surplus cash income. Each payment which the board deemed advisable was also submitted to the approval of the members, which they voted from time to time. The total repayments authorized and paid aggregated 70%. There has been no surplus available since, the members have not approved any payments since, and no board in good faith has deemed any further payments advisable. The club was forced to refinance in 1932. In keeping with the plan and agreement, no subscriber other than plaintiffs has sued or attempted to enforce payment, or to destroy the club or liquidate; and none was ever authorized to seek individual enforcement. There never were any resolutions by the members or by the board to authorize the direct issuance of certificates The scrip certificate was at variance with, and not contemplated by, nor part of the plan and agreement and the resolutions of the members, to which it refers. Nor was the certificate in accordance with the intent, meaning and understanding of all parties. The scrip certificates were issued in October, 1917, long after the transaction occurred, by overzealous officers, without consideration, without authority from the members or the Board of Governors, and were contrary to the statute of Illinois and the by-laws of the club. They were treated and accepted merely as receipts, with full knowledge and consent of the subscribers, including plaintiffs. All understood and had agreed to the entire transaction and plan for repayment out of surplus income only. In 1932, 70% having been repaid, the members were faced with an assessment to repay to themselves the balance of 30%. Times being bad, further repayments out of surplus cash became impossible, various meetings were held, all members and subscribers had notice

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and were invited, the scrip certificates were denounced as invalid, and it was voted for and agreed to call them in for cancellation and surrender. The members agreed that it was more practical to waive any action for the balance and leave all financial matters for further developments and report by the board. Relying on such agreement, vote and acquiescence, other members came forward with $40,000.00 for a new refunding loan to pay off taxes, assessments, the existing mortgage, wages, etc. Plaintiffs or some of them were present or represented and the plaintiffs or their representatives participated in the action taken and agreements made in August and October, 1932; also plaintiffs and Mrs. Woolf, with full knowledge, did not protest or object, but acquiesced in the agreement to cancel and surrender, and in the vote and action taken in 1932. The action taken and the mutual agreements then made were and are binding on all plaintiffs. There has been no money available as yet. In good faith no ways and means have been found or deemed advisable by the board, and no action on further repayments could be forced without injuring the club or outside creditors, or force a sale or liquidation. Such was the intent, agreement, understanding and meaning of all the parties, including plaintiffs. Such was the construction of and performance under and pursuant to the plan and agreement in good faith from 1916 to 1941. None but the plaintiffs have ever reneged or sued.

Arguing in support of the second defense, defendant says that the intent was to build and maintain a club for pleasure and not to speculate in scrip certificates, litigation and liquidation, and that the intent of the entire transaction will control. Plaintiffs answer that the legality, the interpretation and effect of the certificates of indebtedness have been completely fixed by the conduct and performance of the club for 14 consecutive years; that the club is estopped to assert any alleged defense arising prior to October 1, 1931;

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that as a matter of law the certificates of indebtedness were legally issued; that the club had complete, implied power to borrow money for corporate purposes; that it cannor vary the terms of the certificates of indebtedness by parol evidence; and that all preliminary negotiations, whether oral or written, are merged into the written certificates of indebtedness. To determine the intent of a transaction and the effect of any writing, the court will consider the nature of the subject matter, the situation of the parties, their motives and objects, and the surrounding circumstances as well as the meaning and effect as intended and understood by the parties. It is permissible in construing a contract to look to the interpretation the parties have placed thereon and their own performance, for guidance in ascertaining its true meaning and intent. The answer states (and the motion to strike admits) that the subscribers left to the Board of Governors from time to time the complete discretion about payments whenever available from the surplus cash income, after first providing for operating expense, maintenance, principal and interest payments on the mortgage and other debts. The promise was to each other to repay to themselves in years of plenty, but forbear when there was no surplus. Only thus could they enjoy the new permanent home. That was the meaning of their resolution of June 19, 1916 that "such annual payments shall be made in such way and manner as the board may deem advisable". Plaintiffs' contention that defendant is estopped to assert any alleged defense arising prior to October 1, 1931, cannot be urged at this time. That point was not raised in plaintiffs' motion to strike and cannot be raised for the first time in this court. Plaintiffs, not having filed any pleadings, have not asserted that they have been injured or damaged in any way, or misled, or induced to do anything different by any act of the defendant. As to the assertion of plaintiffs that the club had authority to issue the certificates under the statute, its charter and by-laws, we are of the opinion that the averments in the answer on this point raised an issue

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of fact which can be resolved only on a trial on the merits. As to the contention of plaintiffs that the club had complete power to borrow money for corporate purposes, the defendant does not deny that the money was advanced by the members and therefore borrowed by the club under special circumstances and in accordance with a special agreement for repayment out of surplus income. We are of the opinion that the defendant properly pleads that the officers in 1917 did not have authority to issue the certificates and that their action in so doing was contrary to the understanding and agreement of the members made at the time the money was advanced by the members.

We turn to plaintiffs' contention that defendant cannot vary the terms of the certificates of indebtedness by parol evidence, and that all preliminary negotiations, whether oral or written, are merged into the written certificates of indebtedness. In construing a contract it is proper for a court to take into consideration the surrounding circumstances. It should place itself as nearly as it can in the same situation as the parties who made the contract, so that it may view the circumstances as they viewed them, and so that it may judge the meaning of the words and their application to the things described as the parties judged and applied them. Armstrong Paint & Varnish Co. v. Continental Can Co., 301 Ill. 102, 105. This was a club organized for the enjoyment of the members, their families and guests. According to the answer, the members contemplated that payments of the money advanced would not be made unless there was a surplus. The Board of Governors was given authority to decide when payments should be made. This appears to be a natural and reasonable arrangement. Otherwise, a member could, on failure to pay him in any year, take judgment against the club and force the members to pay him, or a liquidation of the club. This would defeat the very purpose for which the club was organized. If the intent was that the certificates of indebtedness should constitute the agreement, plaintiffs would be right in contending that the meaning of such certificates could not be varied by parol evidence. However,

of fact which can be received only on a trial on the merits. In the contention of plaintiffs that the club had immediate needs to borrow money for corporate purposes, the defendant does not deny that the money was advanced by the members and shareholders interested in the club under special circumstances and in accordance with a special agreement for repayment out of surplus income. In view of the relation that the defendant properly claims that the officers in 1917 did not have authority to issue the certificates and that their action in so doing was contrary to the understanding and agreement of the members made at the time the money was advanced by the members.

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under the answer filed, the circumstances under which the loan was made and the intent of the parties as disclosed by their meetings and the records of the club, as well as the interpretation and performance by the parties, may be shown.

The third defense denies the allegations of the complaint, denies that the certificates were submitted to a vote, or that they were authorized by the Board of Governors, and asserts that they were contrary to the statute, the by-laws and not within the scope of authority of the officers. The first part of the third defense asserts that there was no consideration for the certificates and that the recitals therein are subject to explanation and contradiction. Defendant contends that at the time the certificates were issued, the plan and agreement was in effect, 75% of the membership had subscribed on the basis of the plan the sum of $100,000.00, and that the certificates issued were in accordance with the plan. Absence or failure of consideration is a matter of defense as against any person not a holder in due course. The third defense also properly pleads that the certificates were not valid or binding obligations of the club. A further defense is that by mutual agreement in 1932 the members and subscribers waived action for the balance of the original loan. Plaintiffs assert that there are no facts or allegations in the answer, which, if true, would constitute a release by the plaintiffs of the defendant, and that the answer does not show any consideration to the plaintiffs for the proposed release. Mutual waivers and forbearance are good consideration. Release, surrender or abrogation of contractual obligations constitutes a valid defense and such defense may be established from circumstances or course of conduct. Of course, the obligation to pay those who advanced the fund, out of the net proceeds, could not be abrogated as to any person who so made advances, without his consent. The answer, however, sufficiently pleads that there was a mutual agreement by which all members and subscribers waived action for the balance of the loan.

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We have read the case of Flaherty v. Manufacturers' Club of Philadelphia, 159 Atl. (Pa. Super.) 209. Plaintiffs assert that this case is substantially identical with the case at bar. It was decided on the pleadings. There are points in common. However, we are of the opinion that the Flaherty case is not applicable to the defenses presented in the instant case.

The fourth defense is that [illegible] entire transaction, plan and agreement constitutes a parol contract [illegible] barred by the five year Statute of Limitations. The success or failure of this defense will depend upon the outcome of the previous defenses. If on a trial defendant is able to establish one or more of its defenses, then there will be no need to consider whether the action is barred by the Statute of Limitations. On the other hand, if on a trial it is determined that the defendant has failed in its other defenses, in all likelihood it will fail in the defense of the Statute of Limitations. Our view is that the defense of the Statute of Limitations [illegible] present state of the pleadings is premature.

The fifth defense is that plaintiffs are estopped by their conduct, acquiescence and agreement. [illegible] that the club members in 1939 considered an agreement to [illegible] claims and to keep the club out of trouble; that [illegible] and an agreement made among all to [illegible] any action for the balance, to leave it to the board of governors for future transactions, to cancel the void certificates and to raise a new revolving mortgage loan of $40,000.00; that the club relied on the agreement, vote and acquiescence and completely changed its position and purchased its property for $40,000.00 to refund prior debts and pressing claims; that the remaining members took over the pressing burdens and paid out the $40,000.00, and that the rights of the club and all other members who have adhered to the transaction in good faith would be seriously prejudiced by allowing plaintiffs to recover; and that even if plaintiffs did not so

We have read the case of *Flannery v. Baltimore and Ohio of Philadelphia*, 189 Atl. (2d. Super.) 896. Plaintiff's case in this case is substantially identical with the case at bar. It was decided on the pleadings. There are points in common. However, we are of the opinion that the *Flannery* case is not controlling as the defenses presented in the instant case.

The fourth defense is that the settlement, release and agreement constitutes a valid contract and is barred by the five year statute of limitations. The success or failure of this defense will depend upon the outcome of the previous defenses. If on a trial defendant is able to establish one or more of its defenses, then there will be no need to consider whether the action is barred by the statute of limitations. On the other hand, if on a trial it is determined that the defendant has failed in its other defenses, in all likelihood it will fail in the defense of the statute of limitations. Our view is that the defense of the statute of limitations under the present state of the pleadings is premature.

The fifth defense is that plaintiffs are estopped by their conduct, acquiescence and agreement. The answer states that the club members in 1952 considered an assessment to cover operating costs and to keep the club out of trouble; that finally a vote was taken and an agreement made among all to waive and cancel any rights the members, to leave it to the board of directors for future negotiation, to cancel the void certificates and to raise a new mortgage mortgage loan of $40,000.00; that the club relied on the agreement, vote and cancellations and completely changed its position and mortgaged its property for $40,000.00 to refund prior debts and operating claims; that the remaining members took over the operating business and paid out the $40,000.00, and that the rights of the club and all other members who had agreed to the transaction in good faith would be seriously prejudiced in allowing plaintiffs to recover; and that even if plaintiffs did not so

vote and agree, they had f knowledge and did not protest but acquiesced. Plaintiffs ar hat their rights cannot be affected by what third parties may ha done with reference to the 1932 mortgage, or by any instrument to w h the plaintiffs were not parties. It is true that plaintiffs' hts cannot be affected by what third parties may have done in 1932 unless they expressly, or by implication, consented, or unless they are estopped, and this can only be determined when the evidence is heard. We are of the opinion that the court was in error in striking the answer. The judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions to overrule the motion to strike the answer and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KILEY, J. CONCURS.

HEBEL, P.J. TOOK NO PART.

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[illegible] votes and agree, they and [illegible] acquiesced. Plaintiffs on [illegible] what third parties may help [illegible] or by any instrument [illegible] in time their identifier [illegible] parties may have done in [illegible] connected, or unless they [illegible] when the evidence is based [illegible] was in error in stating the [illegible] Court of Cook County is reversed [illegible] to overrule the motion to [illegible] not inconsistent with this opinion.

[illegible]

[illegible]

42330

321 Ill. 327

PETER TULUPAN,

Plaintiff - Appellee,

v.

J. CASPER BAUER,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY.

A

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for compensatory and exemplary damages for constructive eviction. The jury returned a general verdict for plaintiff for $5,000 and a special verdict finding defendant, or his agent, had evicted plaintiff maliciously. Defendant appeals.

In 1934, plaintiff, a Chicago restauranteur at the time, spoke to Cool, a relative of defendant's first wife, about renting a sandwich stand at Bachelor's Grove, owned by defendant, in Cook County. Thereafter he spoke to defendant, a lawyer, and entered into an agreement for a lease for five years dated May 23, 1934, and under the terms of which plaintiff was to construct a kitchen and sandwich stand on an uncovered platform, part of defendant's dance hall and bar leased to Cool. The new improvement was constructed as a lean-to the existing improvement, having as its inside limit a counter, at which plaintiff was to serve his merchandise to those using the bar or dance hall. Under the lease he was given the use of kitchen equipment then on the premises, and the exclusive privilege of selling ice cream, sandwiches, etc. The rent was $20 per month, with the first three months free; and a forfeiture clause provided for forfeiture should plaintiff not pay the rent or should he neglect business for 30 days; and, in the event of forfeiture or at the end of the term, defendant was to

42550

PETER TURNPAN,

Plaintiff - Appellee,

v.

J. DOBPER CAUPN,

Defendant - Appellant.

MR. JUSTICE [illegible] delivered the opinion of the court.

This is an action for compensatory and punitive damages for constructive eviction. The jury returned a general verdict for plaintiff for $5,000 and a special verdict finding defendant, or his agent, had evicted plaintiff wrongfully. Defendant appeals.

In 1934, plaintiff, a Chicago restaurateur at the time, spoke to Dool, a relative of defendant's first wife, about renting a sandwich stand at Wadsworth's Grove, owned by defendant, in Lake County. Thereafter he spoke to defendant, a lawyer, and entered into an agreement for a lease for five years [illegible] 1934, and under the terms of which plaintiff was to construct a kitchen and sandwich stand on an unsurveyed portion, part of defendant's dance hall and bar leased to Dool. The new improvement was constructed as a lean-to the existing improvement, giving an 18 inside limit a counter, at which plaintiff [illegible] to serve his customers obnoxious to those using the bar or dance hall. Under the lease he was given the use of kitchen equipment left on the premises, and the exclusive privilege of selling ice cream, sandwiches, etc. The rent was $50 per month, with the first three months free; and a forfeiture clause provided the forfeiture should [illegible] the rent or should be neglect [illegible] for 30 days; and, in the event of forfeiture or at the end of the term, defendant [illegible]

have ownership of plaintiff's structure. Plaintiff went into possession in June and vacated the premises October 28, 1934. He charges that he was forced to abandon the premises in fear of his life and property by a course of malicious conduct of defendant's and his agents, which violated the lease, destroyed his business and reputation, deprived him of profits and caused him to sustain loss and damage. The issues joined were whether Cool was defendant's agent in his dealings with plaintiff; and whether defendant, or his agents, maliciously evicted plaintiff in violation of the lease, and if so, whether plaintiff by his conduct waived the right to claim eviction, or whether plaintiff forfeited under the lease as defendant contends.

Defendant contends here that the complaint is insufficient. We shall not consider the contentions since no attack was made on the complaint in the trial court. Defendant answered and waived any objections. He makes several contentions relating to the special verdict and since defendant complained of the special verdict in his motion for a new trial, we shall consider them. He says first, that error was committed in permitting the case to go to the jury on the question of malice. His claim is tested by the familiar rules governing directed verdicts. The evidence in plaintiff's behalf is that on several occasions during his tenure, defendant permitted organizations promoting picnics at the Grove to sell sandwiches, etc. in violation of plaintiff's exclusive privilege; that when he objected he was told by Sauer, "If you don't like the way they are conducting the business, you can take your trash and get off my premises, and I will throw all the pop bottles in there on the back of your head"; that he was told by Cool when he inquired about the partition having been built, which prevented his carrying on the business, "If you don't like it, you can get out. I will

break your neck and I won't save your eye"; that when he sought to complain on another occasion, Cool told him to see Sauer and Sauer then told him to see Cool; that Cool told him once that if he did not contribute to the cost of a picnic band, the picnickers would be permitted to sell food; that again when plaintiff refused to sublease his stand for a day to picnickers, Cool told the picnickers to see that food was purchased at stands other than plaintiff's; that when the outside and inside doors to plaintiff's lean-to were nailed and the lattice partition nailed on, he was advised by Cool "that Bill and I did it" and there is evidence that Cool had told defendant about this conduct; that about October 23rd or 24th he found the ice box, which he had used, removed and his merchandise strewn about and spoiled and, when he inquired about it, he was told by Cool that they did not want him there and that he should get out and that Cool would blow plaintiff's brains out; and that he left on October 28th. We believe that we have pointed out ample testimony tending to prove malice on the part of defendant and of Cool, if the latter was defendant's agent, to warrant the cause being submitted to a jury. This conclusion disposes of defendant's other claims of error in permitting cross-examination of defendant as to his present wealth (Eshelman v. Rawalt, 298 Ill. 192), submitting the interrogatory to the jury and in giving instructions Nos. 36 and 37 upon the question of exemplary damages. Because of the evidence referred to, these claims are resolved against defendant.

The question of the agency of Cool was for the jury because the evidence shows that Cool collected the rent from plaintiff for defendant, put up the lattice partition, even according to defendant's theory, as a partial service to plaintiff; and there is evidence that Cool was a "boss" and defendant's testimony that, Cool was "boss" and had the run of the premises while he was away. On an examination of

the record we find that there is sufficient evidence to support the finding that Cool was defendant's agent in his dealings with plaintiff.

Complaint is made of instructions 35 to 43. We have already disposed of the objections to instructions No. 36 and 37. Instruction No. 35 told the jury that if they believed from the evidence that defendant interferred with the beneficial enjoyment by defendant, then there was an eviction releasing plaintiff from the payment of rent, and that they should find for the plaintiff. Instruction No. 38 in part told the jury that if they believed that the defendant by his or his agent's conduct showed an intention not to be bound by the lease "and their acts amounted to an eviction", then plaintiff "had the right to treat said contract as abandoned by said defendant, and unless you believe from the greater weight of the evidence that the defendant receded from such intention not to be bound, prior to the time when said plaintiff chose to treat said contract as abandoned by defendant, etc." The instruction finished by suggesting two questions which the jury should answer in order to arrive at the determination outlined in the beginning of the instruction. This instruction is indefinite and uncertain and, we think, was not helpful to the jury. Instruction 39 told the jury that the landlord had no right to interfere with the plaintiff's enjoyment under the lease and that if the jury believed that defendant or his agent purposely did, or caused to be done, any of the acts shown by the evidence, and if the jury further believe from the greater weight of the evidence that such acts "resulted in injury to the plaintiff", the jury should find for the plaintiff and assess his damages at such sum as they believed from the evidence he sustained. This instruction directing a verdict does not define what acts, under the pleadings, must have been committed in order to justify a recovery by plaintiff. We find no objection to instruction 40.

the record we find that there is sufficient evidence to support the finding that Cool was defendant's agent in the dealings with plaintiff.

Complaint is made of instruction No. 36, We have already discussed of the objections to instructions No. 36 and 37. Instruction No. 35 told the jury that if they believed from the evidence that defendant interfered with the contract of employment by defendant, then there was an actionable relationship from the payment of rent, and that they should find for the plaintiff. Instruction No. 38 in part told the jury that if they believed that the defendant by his or his agent's wrongful conduct induced the tenant not to be bound by the lease "and their acts constituted an eviction", then plaintiff "had the right to treat such eviction by said defendant, and unless you believe from the greater weight of the evidence that the defendant proceed from such acts" [illegible] be bound, prior to the time when said plaintiff could in event [illegible] contract as abandoned by defendant, etc." The instruction finishes by suggesting two questions which the jury should answer in order to arrive at the determination outlined in the beginning of the instruction. This instruction is indefinite and uncertain and, we think, was not helpful to the jury. Instruction 38 told the jury that the landlord had no right to interfere with the plaintiff's employment under the lease and that if the jury believed that defendant or his agent purposely did, or caused to be done, any of the acts shown by the evidence, and if the jury further believe from the greater weight of the evidence that such acts "resulted in injury to the plaintiff", the jury should find for the plaintiff and assess his damages at such sum as they believed from the evidence be entitled. This instruction directing a verdict does not define the [illegible] under the pleadings, must have been considered in order to justify a recovery by plaintiff. We find no objection to instruction No.

Instruction 41 told the jury that where parties enter into a contract and one is ready and willing to perform and makes preparations to perform and does perform, but is prevented from further performance by the other's acts, the former can recover all damages suffered by him by reason of a penalty including necessary expenses incurred in preparation. This instruction was probably conceived to cover preparations for picnics by plaintiff, but is too indefinite to be of any aid to the jury, and the latter part referring to damages is entirely too broad. Instruction 42 told the jury that if they believed that defendant interfered with plaintiff's enjoyment under the lease and rendered the premises useless for the purpose thereof, that defendant's conduct constituted constructive eviction and continued "In that event, the defendant, the lessor in this cause is liable to the plaintiff for such damage as he may prove, if any, by a preponderance or greater weight of the evidence." It is to be noted that this instruction in effect directs a verdict and in the last sentence there is no limit of the damage to that which resulted from the conduct of the defendant. Instruction 43 told the jury that if they believed that defendant nailed up the stand, so as to injure plaintiff in pursuing the business "for which the premises were rendered", then in law there was a constructive eviction and that if plaintiff moved out of the building before November 1st, he would not be liable for rent thereafter. It will be remembered that there was evidence that plaintiff agreed to the nailing up of the partition. Under this instruction, even if the jury found that plaintiff had so agreed, they could find that, nevertheless, the nailing up of the partition constituted an eviction. Instructions 35, 39 and 42 which directs verdicts for the plaintiff, omit an element necessary to plaintiff's recovery, that he surrender possession of the premises within a reasonable time after the eviction relied upon. Giddings v. Williams, 336 Ill. 482 and

Keating v. Springer, 146 Ill. 481. This was a vital deficiency which could not be cured by any other instructions. Hanson v. Trust Company of Chicago, 380 Ill. 194.

Defendant says there was no proof of actual damages by plaintiff. Both compensatory and exemplary damages were sought. Defendant says he paid $800 for the stand; that in preparing for picnics, he spent about $300; that he bought an electric stove, cash register, scale and other articles costing about $350; that he did not remove any of the "goods or fixtures or things" ordinarily bought and that some merchandise was spoiled by defendant's agents. If we assume that all of the merchandise bought in preparation for picnics was lost, we find a total of about $1,450 damage. There is no proof of any loss of business. While this evidence is not satisfactory upon which to base compensatory damages, it is more certain than the basis laid in the proof for punitive damages. Defendant said he had " a little farm, about ten acres" with an $8,000 mortgage against it and a remodeled two apartment building in Chicago with a $5,250 mortgage against it. There was no evidence of the value of either property and no way of knowing the value of defendant's interest. Punitive damages should be related to a man's wealth, that is the reason for admitting testimony as to his wealth, otherwise, an allowance against two men of the same damages under the same circumstances might be slight punishment for a rich one and a crushing punishment for a poor one. Punitive damages arising from the commission of a crime have been measured against the fine provided by law for that crime, Eshelman v. Rawalt, 298 Ill. 192, as a means of determining its fairness. Here, there is no basis for testing what we consider the probable punitive damages in the verdict.

Defendant complains of prejudicial argument to the jury by plaintiff's counsel. Plaintiff says that, assuming for the purpose that the argument "had some of the aspects of being prejudicial

Keeling v. [illegible] vital evidence
which could not [illegible] Brown v. [illegible]
Company of Chicago, [illegible]

Defendant [illegible] by
plaintiff. [illegible]
defendant [illegible]
plaintiff, be [illegible]
register, [illegible]
not remove any [illegible]
and that some [illegible]
re reason [illegible]
plaintiff was [illegible]
no proof of any [illegible]
factory [illegible]
then the [illegible]
said be had a [illegible]
against it [illegible]
$5,000 verdict against it. [illegible]
either property [illegible]
punitive damages should be [illegible]
reason for exercising [illegible]
allowance against the [illegible]
might be right [illegible]
for a poor one. [illegible]
[illegible]
[illegible] Kahlman v. [illegible]
[illegible]
the proceeds [illegible]

Defendant [illegible]
by plaintiff's [illegible]
purpose that the [illegible]

and was not based on the evidence" there would still be no justification for reversal of the case. Some of the argument by plaintiff's counsel was improper and the trial court should have protected defendant by sustaining objections which were made, instructing the jury to disregard the portion objected to and admonishing, as he did once, plaintiff's counsel upon each offense.

For the principal reasons that the giving of certain instructions was reversible error, and because of the deficiencies in the proof of damages and the basis for exemplary damages, the judgment is reversed and the cause remanded, we need not consider the question whether or not the verdict is against the manifest weight of the evidence.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND BURKE, J. CONCUR.

42389

FREDA RICHTER,

Appellant,

v.

WALTER J. CUMMINGS and DANIEL C. GREEN, as Receivers of Chicago Railways Company, a Corporation, and

EDWARD J. FLEMING and CHARLES H. ALBERS, as Receivers of Chicago Railway Company, Calumet and South Chicago Railways Company and The Southern Street Railway Company, corporations, doing business as Chicago Surface Lines,

Appellees.

321 I.A. 627

APPEAL FROM

[illegible] COURT

COOK COUNTY.

314 302 254

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action in which the trial court directed a verdict for defendants at the close of plaintiff's case and entered judgment, from which plaintiff appeals. She charged that while in the exercise of due care she was injured as a result of the negligent operation of defendants' street car.

Defendants admit that the evidence properly considered on their motion tended to prove their negligence. They stand on the proposition that, as a matter of law, there is no evidence tending to prove plaintiff's due care.

Plaintiff, 62 years old, wearing glasses, was struck by defendants' street car at Lawrence and Kildare avenues, Chicago, Illinois, at about 10 P. M., while she was crossing Lawrence avenue in the rain, carrying an umbrella. As she came to the north curb of Lawrence avenue, walking south on the west side of Kildare avenue, she saw the street car about a block away approaching from the west on the eastbound tracks on the south side of Lawrence avenue. She commenced to cross Lawrence avenue, while she kept looking at the approaching car and, when between the west and east-bound tracks with the car about 3 or 4 houses away, she saw the

42589

FREDA GIONTAS,

Appellee,

v.

WALTER L. DUNLAP and [illegible]
as Receivers of Chicago [illegible]
a Corporation, and

EDWARD J. BLAKELY [illegible]
as Receivers of Chicago [illegible]
Calumet and South Chicago Railway [illegible]
and the Southern Street [illegible]
corporations, doing business as Chicago
Surface Lines,

Appellants.

Mr. Justice [illegible] delivered the opinion of the court.

This is a personal injury suit in which the trial court directed a verdict for defendants at the close of plaintiff's evidence and entered judgment [illegible] that while in the exercise of due care [illegible] as a result of the negligent operation of defendants' cars.

Defendants [illegible] on their motion [illegible] the proposition that [illegible] tending to prove plaintiff's due care.

Plaintiff, [illegible] defendants' street car [illegible] Illinois, at about 10 [illegible] in the rain, carrying [illegible] of Lawrence avenue. [illegible] avenue, she saw the street car [illegible] the west on the eastbound track on [illegible] avenue. She commenced to cross Lawrence avenue [illegible] looking at the approaching car and, [illegible] bound tracks with her [illegible] and [illegible]

motorman and others on the front platform and the former was looking away from the direction in which the street car was traveling. About this time the car seemed to slacken speed, but then came on faster and she continued south in front of it and, as she was about to "get off" the eastbound rails, turning so as to be in a position to board the car, she was struck by its right front end. Her testimony was corroborated by a passenger who stood at the motorman's side, saw plaintiff from the time she left the north curb until the impact and who says that the motorman was looking to the right and not ahead as plaintiff came to the eastbound rails.

Plaintiff does not deny that she was required to prove her due care as an element of her case separate from defendants' negligence. The evidence, taken as true, does not tend to prove her due care. Roberts v. Chicago City Railway Co., 262 Ill. 228; Mortell, Admr. v. Richardson, 285 Ill. App. 586; Russell v. Richardson, 308 Ill. App. 11; National Builders Bank of Chicago, Admr. v. Cummings, 315 Ill. App. 212. The inferences which seem to favor her, but really do not, are that she depended on the motorman seeing her and avoiding striking her. (Mortell, Admr. v. Richardson); and that the motorman was looking away from the direction the car was traveling, as to this inference the rule is that she should have used additional caution, for the motorman's negligence alone does not determine plaintiff's due care. Russell v. Richardson, 308 Ill. App. 11.

All the circumstances of this unfortunate accident created a dangerous condition, placing on plaintiff the duty of crossing Lawrence avenue with care commensurate with the danger. Russell v. Richardson. Since the evidence, taken as true, with the inferences therefrom considered most strongly in plaintiff's favor does not tend to prove that she was in the exercise of due care, the court properly

directed a verdict for defendants and the judgment is, therefore, affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND DUNKE, J. CONCUR.

42433

321 I.A. 628

A

CATHERINE LUSS,

Appellee,

v.

CITY OF CHICAGO, a municipal corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

315253 04

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment for $500. The City offered no evidence at the trial, and has appealed.

Plaintiff, 51 years old, on her way from her home to work, walked south on the east sidewalk of Laramie avenue in Chicago to its intersection with the north side of Ohio street and turned west into the latter to cross Laramie avenue for a southbound bus. She fell and was injured when her foot reached a point where the first cement sidewalk slab east of the curbstone had pulled away from and was 2¼ inches lower than the next slab to the east. The day was dry and clear and she was looking out toward the street, "watching where I was going" and, seeing a bus coming she quickened her pace and a few steps later fell. She had almost fallen at the same place a week or two before and knew the difference in level was there, but for a moment did not remember it and, although it was sunken enough to be seen, she was approaching to the west on the higher level, the sunken slab away from her.

The City in its brief says the only claimed defect was the difference in the level. The charge in the complaint is that the City negligently "allowed said sidewalk to be depressed uneven and at a materially different level", and plaintiff's testimony is that

one slab had pulled away from and had sunk lower than the next slab. The question, therefore, is not precisely as the City puts it, whether it was guilty of negligence for failing to repair the difference in the level of the adjoining slabs of the sidewalk. There is no question raised as to plaintiff's due care or lack of notice of the condition of the sidewalk. Many cases are cited by both parties, but we believe that the decisions of the First Division of this Court in Orban v. City, 313 Ill. App. 144, and Kuhn v. City, 319 Ill. App. 525, and the Supreme Court case of White v. City of Belleville, 364 Ill. 577, are sufficient authority for our conclusion that we cannot hold as a matter of law that the City was not negligent in failing to repair the defect in the sidewalk, in the instant case, which led direcly to the street and where one slab had pulled away from and had sunk 2 or 2½ inches lower than the one next to it.

The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

42619

321 I.A. 629

STEVE JANITCH,

Appellee,

v.

COCA COLA BOTTLING CO. OF CHICAGO, INC., a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

316 256 308

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury and property damage action and counterclaim for property damage, tried without a jury. There was judgment for plaintiff for $225 and costs on the statement of claim and against defendant on the counterclaim. Defendant appeals.

December 31, 1940, about 5:30 P. M., plaintiff while driving, in the rain, south on Canal street, 65 feet wide, came to a stop in obedience to the red traffic control light at Monroe street, which is 30 feet wide, in Chicago. His car was about 7 feet east of the west curb and several feet north of the traffic control signal post on the northwest corner. East of his car, also stopped, was a southbound bus which blocked his vision to the east. When the light changed to green, the bus and plaintiff's car commenced moving south. The bus stopped, plaintiff's car moved on and collided with defendant's truck going west on Monroe street.

We are not asked to weigh the evidence and, consequently, shall decide only the question of law whether reasonable minds would come to no other conclusions on the evidence but plaintiff's contributory negligence and lack of negligence on the part of defendant.

There is evidence in plaintiff's behalf that when the signal light changed to green, the bus started and then plaintiff's car did so; that the bus was ahead until it reached the first rail of the westbound tracks, when it stopped as though to make a left turn and plaintiff continued on in first gear, about six miles an

42619

STEVE LANITOR,

Appellee,

v.

COCA COLA BOTTLING CO. OF CHICAGO, INC., a corporation,

Appellant.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT:

This is a personal injury and property damage action and counterclaim for property damage, tried without a jury. There was judgment for plaintiff for $254 and costs on the statement of claim and against defendant on the counterclaim. Defendant appeals.

December 21, 1940, about 8:30 [illegible], plaintiff was driving in the rain, south on Canal street, 35 feet wide, came to a stop in obedience to the red traffic control light at Monroe street, which is 30 feet wide, in Chicago. His car was about 7 feet east of the west curb and several feet north of the traffic control signal post on the northwest corner. Next of his car, also stopped, was a southbound bus which blocked his vision to the east. When the light changed to green, the bus and plaintiff's car commenced moving south. The bus stopped, plaintiff's car moved on and collided with defendant's truck going west on Monroe street.

We are not asked to weigh the evidence but, consequently, shall decide only the question of law whether reasonable minds would come to no other conclusions on the evidence but plaintiff's contributory negligence and lack of negligence on the part of defendant.

There is evidence in plaintiff's behalf that when the signal light changed to green, the bus started and then plaintiff's car did so; that the bus was ahead until it reached the first rail of the westbound tracks, when it stopped as though to make a left turn and plaintiff continued on in first gear, about six miles an

hour, and, plaintiff seeing the truck, stopped "on a dot" between the west and east tracks in Monroe street; that the truck went around the bus to the wrong side of the street and then "kind of swerved", turned in again, could not stop and hit plaintiff's car; and that the truck driver admitted driving through the amber light at 15 miles per hour. This evidence was sufficient to make out plaintiff's prima facie case.

There is further evidence that plaintiff drove into the intersection, though the light was in his favor, while unable to see, because of the position of the bus, whether there was any westbound traffic entering or in the intersection. Crown Name Plate & Manufacturing Co. v. Dammerich, 279 Ill. App. 103, cited by defendant, is not applicable since there were no traffic control signals at the intersection there involved. Plaintiff did not move while the bus waited (Capillon v. Lengsfield, 171 So. 194 (La.)), nor try to "beat" the bus. Thomas v. Roberts, 144 So. 70 (La.). It is true plaintiff, because he could not see east for traffic, was bound to be more cautious. Reasonable men, however, might differ in their views whether proceeding in first gear at six miles an hour, able to stop "on a dot" was not sufficient caution under the circumstances. Plaintiff could not rely upon the bus driver's prudence, but again reasonable men might question whether staying under protection of the bus until it had crossed most of the north half of Monroe street and then moving out and able to "stop on a dot" was negligent conduct. We believe these were questions of fact for the trial judge. Since there is evidence that the truck driver drove through an amber light at 15 miles per hour in the rain at 5:30 P. M. on December 31st, we believe the question of defendant's negligence was also one of fact for the judge. This evidence was sufficient basis upon which the court could find that defendant was not lawfully in the intersection and, accordingly, not entitled to the advantages under Par. 129 Motor Vehicle Law, (Chap.95½, Ill. Rev. Stats.). The judgment is, accordingly, affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

hour, one, plaintiff seeing the truck, [illegible] the west and east tracks in Kenner street; the truck was around the bus to the wrong side of the street and then "[illegible]" turned in again, could not stop and hit plaintiff's car; and that the truck driver admitted driving through the [illegible] per hour. This evidence was sufficient to [illegible] [illegible] case.

There is further evidence that plaintiff [illegible] section, though the light was in his favor, [illegible] because of the position of the car, whether there was any approaching traffic entering or in the intersection. [illegible] [illegible] Factoring Co. v. Lemmerman, 272 Ill. App. 1[illegible], citing [illegible], [illegible] not applicable since there were no traffic control signals at the intersection there involved. Plaintiff [illegible] waited (Gaillon v. [illegible], 171 So. 72[illegible] (La. [illegible]), [illegible] "beat" the bus. Thomas v. [illegible], [illegible] (La. [illegible]), [illegible] plaintiff, because he could not see past the [illegible], was bound to be more cautious. Reasonable men, however, might differ in their views whether proceeding in first gear at six miles an hour, while in stop "on a dot" was not sufficient caution under the circumstances, [illegible] tiff could not rely upon the bus driver's [illegible], but [illegible] men might question whether staying under protection of the bus until it had crossed most of the north half of Kenner [illegible] [illegible] out and able to "stop on a dot" was [illegible] conduct. [illegible] there were questions of fact for the trial jury. [illegible] evidence that the truck driver [illegible] per hour in the rain at 8:30 [illegible], [illegible] question of defendant's negligence [illegible] This evidence was sufficient basis upon which the court could find that defendant was not lawfully in the intersection [illegible], accordingly, not entitled to the advantages under [illegible] (Ill. [illegible], Ill. Rev. Stats.). The judgment is, accordingly, affirmed.

JUDGMENT AFFIRMED.

[illegible]

42591

SUNBEAM HEATING COMPANY, Inc.,
Plaintiff,

v.

EDWARD W. and MARY C. CHAMBERS,
and GEORGE and ANNIE TOMES et al.,
Defendants.

ALBERT E. LAKE,
Petitioner,

PETER A. GROSSO,
Respondent.

APPEAL OF
ALBERT E. LAKE and GEORGE and
ANNIE TOMES,
Appellants.

PETER A. GROSSO,
Appellee.

321 I.A. 629

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In August 1932 plaintiff filed a bill to foreclose a mechanic's lien against property known as 55 West Burton place, Chicago, for the installation of a furnace costing $412, of which amount $120 had been paid on account. The furnace was ordered by Edward W. Chambers and wife, parties in possession. Title to the property was in George and Annie Tomes, who on April 17, 1924 had executed a trust deed to the Chicago Title and Trust Company for some $9,000. Albert E. Lake was the owner of the notes secured by the trust deed. The complaint to foreclose the mechanic's lien made the holders of the notes parties defendant as "unknown owners or holders." Lake had no actual knowledge of the pendency of the mechanic's lien foreclosure proceedings until long after the decree was entered, and the Tomes contended that they had not been served with summons. After decree, Lake and the Tomes filed petitions to set aside the decree, and motions to strike their petitions were allowed by the court. The facts pertaining to that proceeding are fully set forth in our opinion No. 41633

[illegible]

v.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

In August 1893 [illegible] filed a bill in equity [illegible] mechanic's lien against property known as [illegible] Chicago, for the installation of [illegible] amount $120 had been paid on account. The judgment was entered by Edward [illegible] Chambers and wife, [illegible] in possession. Title to the property was in George [illegible] had executed a trust deed to [illegible] for some $9,000. Albert [illegible] by the trust deed. The [illegible] made the holders of the notes [illegible] or holders." Lake had no [illegible] knowledge of the [illegible] mechanic's lien foreclosure proceeding until [illegible] after the decree was entered, and the [illegible] been served with summons. [illegible] petitions to set aside the decree, and motions to [illegible] their petitions were allowed by the court. The [illegible] that proceeding are fully set forth in our [illegible]

filed December 30, 1941, and need not be repeated here. Upon the appeal prosecuted by Lake and the Tomes we reversed the order of the court sustaining the motions to strike their petitions and remanded the cause with directions that the motions be overruled; that respondent be required to answer the petitions and that a hearing be had thereon as to the jurisdictional facts; "that if the court should ultimately find, after hearing, that no valid service was had upon petitioners, the decree be vacated and set aside in accordance with the prayer of the petitions; or, if the court should find, after hearing, that it had jurisdiction of petitioners, the decree be ordered to stand in full force and effect." The cause was then redocketed and a hearing was had before Judge Cornelius J. Harrington who, pursuant to a hearing upon the jurisdictional facts, found that the defendants George and Annie Tomes were not served with summons, and ordered that the decree theretofore entered August 12, 1937 be vacated and set aside and that leave be given George and Annie Tomes to plead, answer or demur to the bill of complaint within 30 days.

Following that order Peter A. Grosso, respondent, on June 2, 1942 filed a petition to vacate the order entered by Judge Harrington, and for a rehearing, wherein he alleged, inter alia, "That since the aforesaid hearing and the entry of the aforesaid order, respondent has gained access to the records of the Sunbeam Heating Company, Inc., which up to a few days ago and for some years prior thereto were in the possession and custody of the American Radiator and Standard Sanitary Corporation, at its principal office in Pittsburgh, Pennsylvania, and of the said records at the time of the hearing respondent was wholly ignorant, and by due diligence could not have produced in court; That an examination of said records discloses that the said George Tomes and Annie Tomes were served with summons in the aforesaid foreclosure proceed-

filed December 20, 1941, and was not be prior to the date. Upon the appeal presented by Lane and the Board of Review the order of the court striking the motions to dismiss the petitions and remanded the case for further proceedings, the motions be overruled; that respondents be required to answer the petitions and that a hearing be had thereon on the jurisdictional facts; "that if the court should determine that, after hearing, that no valid service was had upon petitioners, the decree be vacated and set aside in accordance with the prayer of the petitions; or, if the court should determine, after hearing, that it had jurisdiction of petitioners, the cause be ordered to stand in full force and effect." The cause was then remanded and a hearing was had before Judge Harrington, who, pursuant to a hearing upon the jurisdictional facts, found that the defendants George and Annie Jones were not served with summons, and ordered that the decree theretofore entered August 12, 1934 be vacated and set aside and that leave be given George and Annie Jones to plead, answer or demur to the bill of complaint within 30 days.

Following that order, the Board, respondent, on June 5, 1942 filed a petition to vacate the order entered by Judge Harrington, and for a rule nisi, wherein it alleged, inter alia, "That since the entry of said hearing and the entry of the aforesaid order, respondent has found and come into the records of the Jackson Building Corporation, Inc., which up to a few days ago and for some years prior thereto was in the possession and custody of the American National Bank and Trust Company, Sanitary Corporation, its official office in Pittsburgh, Pennsylvania, and of the said records it has come to the hearing respondent was wholly ignorant of, and by no diligence could not have procured in court; that in searching the said records disclosed that the said George Jones and Annie Jones were served with summons in the aforesaid foreclosure proceed-

ings and had actual knowledge of said proceedings; that within two weeks of service, to-wit, September 15, 1932, Annie Tomes called at the office of the attorney for the plaintiff at which time she discussed the proceedings with him, paid $50.00 on account and agreed to liquidate the balance of the account in installments; that thereafter and on several occasions, the said George Tomes and Annie Tomes were contacted in person by a representative of the plaintiff, who on such occasions discussed with them the foreclosure proceedings; that the attorneys for the plaintiffs wrote to the said George Tomes and Annie Tomes subsequent to the service of summons in which letters the said George Tomes and Annie Tomes were advised of the said foreclosure proceedings and that in response to one of said letters the said Annie Tomes wrote a letter in which she pleaded poverty as an excuse for her failure to make payments;" and it is alleged that in making the representations in their petitions the Tomes swore falsely, and upon the hearing testified falsely with respect to the question of service, and thus imposed upon the court and induced the order before Judge Harrington by perjured testimony.

The petition for rehearing was thereafter deferred over the summer vacation, and in fall the matter came up for disposition before Judge Walter J. LaBuy, who had succeeded Judge Harrington as chancellor. On the hearing before Judge LaBuy Grosso sought to prove by A. S. Frankenstein, an attorney, that Annie Tomes came to his office on September 15, 1932, shortly after the purported summons was issued, gave him a $50 tax warrant in part payment of the mechanic's lien indebtedness, and agreed to pay $10 a month thereafter; that upon default in the subsequent payments Frankenstein wrote two letters, one dated December 14, 1934 and the other August 22, 1935, to the Tomes' summer residence at New Carlisle, Indiana, asking them to make payments on the furnace. The Tomes lived in Chicago and their address in the city was undoubtedly known to

tings and had actual and legal notice of said proceedings; that within two weeks of service, to-wit, September 1, 1924, defendants were called at the office of the attorney for the plaintiff and at that time she discussed the proceedings with the plaintiff, gave her account and agreed to liquidate the balance of the account in installments; that thereafter and on several occasions, the said George Jones and Annie Jones were contacted in person by a representative of the plaintiff, and on such occasions discussions with them the foreclosure proceedings, the account for the plaintiffs wrote to the said [illegible] Annie Jones subsequent to the service of summons in said [illegible] George Jones and Annie Jones [illegible] the said foreclosure proceedings and that in response to [illegible] the said Annie Jones wrote a letter in which she [illegible] as an excuse for her failure to make payments" and [illegible] alleged that in making the representations in their petitions the Jones acted falsely, and upon the hearing testified [illegible] respect to the question of service, and that [illegible] the court and induced the order before [illegible]

The petition for rehearing [illegible] defeated over the answer vacation, and in [illegible] for disposition before Judge Lesser [illegible] Harrington as chancellor. [illegible] Grosso sought to prove by [illegible] that Annie Jones came to his office on [illegible] shortly after the purported service [illegible] tax warrant in part payment of the [illegible] and agreed to pay the a month thereafter; that [illegible] the subsequent payments [illegible] dated December 14, 1924 and the [illegible] the Jones' answer [illegible] them to make payments on the [illegible] Chicago and their address in the city was [illegible]

Frankenstein. There is nothing in the record to indicate why he should have written to them in New Carlisle, Indiana, especially in December 1934, when presumably they would not have been occupying their summer residence there. At any rate, both Mr. and Mrs. Tomes denied ever having received a letter from him. Another witness, Herbert C. Cummings, testified that he lived at Elyria, Ohio, was attorney for Sunbeam Heating Company from 1928 to 1939, that he wrote a letter to Mr. Tomes February 11, 1936 to 55 West Burton place, asking him to see Mr. Irwin P. Lewis, an associate of Frankenstein, and in which he stated that in 1932 he had discussed with Tomes the disposition of the lien and had received Tomes' assurance that the indebtedness would be paid. Another witness, A. T. Roberts, who was a collector for the Sunbeam Heating Company, testified that in August 1932 he called on Tomes in New Carlisle, Indiana, and asked him to execute a mortgage, which Tomes refused to do; that in September 1932 he received a telephone call from a person whose voice he recognized as that of Mrs. Tomes, wherein she told him that they had been served with a summons, and that he referred her to Frankenstein. Roberts had previously talked to Mrs. Tomes only once and never before over the telephone. It is therefore highly improbable that he would have recognized her voice. The foregoing testimony was offered in support of the allegation in the petition for rehearing as to the newly discovered evidence. There was no convincing evidence to support the allegation that the Tomes had testified falsely before Judge Harrington. On the hearing before Judge LaBuy both Tomes and his wife steadfastly denied that they had ever been served with summons in the original mechanic's lien foreclosure proceeding; and it is inconceivable that they or Lake would have permitted the foreclosure of such valuable property to satisfy the meager balance of $292 if they had been aware of the suit. At the conclusion of the hearing Judge LaBuy entered an order finding

that the Tomes had been duly served with summons on September 1, 1932, that Grosso's petition to vacate the order entered by Judge Harrington on May 7, 1942 and for a rehearing, be sustained, that the order theretofore entered by Judge Harrington be vacated, and it directed that the decree entered on August 12, 1937 stand in full force and effect. Lake and the Tomes appeal from that order.

The sheriff's return showed that he had served George and Annie Tomes at their usual place of abode by leaving a copy of the summons with M. Grandholm (maid), a member of their family, a person of the age of ten years and upwards, at the same time informing her of the contents of the summons. In their pleadings the Tomes denied that they ever had a maid of that name or that a copy of the summons was ever left at the place of their abode with anyone by that name, or any other person. They operated an employment agency at the address where the purported summons was alleged to have been served upon them, and also lived on the premises. Both of them testified that they were there substantially all the time, and had applicants for positions waiting to be interviewed, which required them to be constantly present; that they kept a record of people employed by them and for whom they secured employment, and that their records showed that no one by the name of M. Grandholm had been employed by them as maid or otherwise. Instead of ordering their records to be produced in court, Judge Harrington suggested that all the parties and their attorneys proceed to the Tomes' place of business and there examine the records. That procedure was followed. No person by the name of Grandholm appeared on their records. Judge Harrington thereupon entered the order heretofore set forth. When the matter came up for hearing before Judge LaBuy he indicated that "I am not going to go back and look into the evidence submitted before Judge Harrington, I am going to proceed on the assumption, what has been stated here, that the evidence before Judge Harrington

[illegible]

was the testimony of the sheriff, in substance that he served these people by leaving the summons with the maid, and they deny that they had a maid." The evidence adduced before Judge Harrington, from which he made the finding that summons had not been served upon the Tomes, should not have been disregarded by Judge LaBuy, who evidently based his conclusions supporting a contrary finding upon evidence adduced on behalf of Grosso that the Tomes knew of the suit subsequent to the time that summons was alleged to have been served upon them.

In Albers v. Bramberg, 308 Ill. App. 463, plaintiff sued on a note, and service was alleged to have been had upon a maid in the home of the defendant's son. Defendant did not reside with his son and subsequently filed a special appearance to quash service. The court overruled his motion, an answer was filed, and upon trial judgment was rendered against defendant. On appeal the court said that the service was wholly insufficient to give the trial court jurisdiction of the person of defendant, and held that where the court has no jurisdiction its judgment is void. It appeared that Bramberg, through his son, had knowledge of the suit, and a copy of the summons was mailed to him at his son's home. Nevertheless, because the summons had not been served upon him, and notwithstanding the fact that he had knowledge of the suit, the court held that the judgment was void for lack of jurisdiction.

It is significant that Frankenstein was present at the hearing before Judge Harrington but did not testify. If, as stated by him, Annie Tomes came to his office on September 15, 1932, which was only two weeks after the purported summons had allegedly been served, and gave him a $50 tax warrant and agreed to pay $10 a month to make up the balance of the indebtedness, and he subsequently wrote two letters to the Tomes at their summer home in New Carlisle, Indiana, it is strange that he did not so testify before Judge Harrington. That witness was

available to Grosso upon the first hearing, and could have been produced before Judge Harrington by the exercise of ordinary diligence.

The Tomes and Lake have a substantial interest in this property; the former are owners of the equity and Lake is the owner of some $9,000 of notes secured by a mortgage on property alleged to be worth $19,000. Judge Harrington, after a full hearing, found that the Tomes had not been served with summons. The newly discovered evidence adduced before Judge LaBuy tended to prove only that the Tomes knew of the suit after the sheriff had made his return. That circumstance in itself would not have warranted the granting of Grosso's petition and the order entered thereon. Nor would the scant testimony of Roberts, that Mrs. Tomes admitted over the telephone that she had been served, warrant the reversal of Judge Harrington's finding as to service, and the entry of the order from which this appeal is taken.

For the reasons indicated, the order of the Circuit court is reversed and the cause is remanded with instructions to allow the motion to quash summons, vacate the decree, allow defendants to plead, answer or demur if they see fit to do so, and to proceed with a hearing of the mechanic's lien suit upon its merits.

ORDER REVERSED AND CAUSE REMANDED
WITH INSTRUCTIONS.

Scanlan and Sullivan, JJ., concur.

42653

321 I.A. 630

GOLDIE BUEHLER, Appellee, v. ALBERT C. BUEHLER, Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

9 3074

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

October 8, 1942 Goldie Buehler filed a petition in the Superior court for an order on respondent, Albert C. Buehler, to pay attorneys' fees and expenses in connection with two appeals then pending in the Appellate court bearing Gen. Nos. 42392 and 42393. The litigation between these parties originated in 1935 by a complaint for divorce which was terminated by a final decree entered October 20, 1937. Thereafter numerous proceedings were filed, resulting in some six appeals wherein the controverted matters were here adjudicated, the last two of which were Gen. Nos. 42392 and 42393, in which opinions were filed April 20, 1943 (318 Ill. App. 640 and 318 Ill. App. 641, both abstracted). The present appeal is taken from a decree ordering respondent to pay $750 attorneys' fees and $100 expenses incurred by petitioner in defending the two latter appeals.

Respondent filed a motion to strike the petition for the following reasons: (1) that no process was served on respondent pursuant to rule 60, section 6 of the Superior court; (2) that the petition was improperly presented before Judge Schwartz in violation of a general order entered July 6, 1942 by the Executive Committee of the Superior court; (3) that there is no statutory or other power whereby the court may require respondent to pay attorneys' fees incurred by petitioner; and (4) that the petition fails to state a cause of action.

[illegible]

[illegible]

October 8, 1942, [illegible] filed a petition [illegible] the Supreme Court for a writ of certiorari [illegible] that [illegible] should, to pay attorneys' fees and expenses in connection with two appeals then [illegible] to be heard [illegible] Nos. 4232 and 4233. The litigation between the parties originated in 1937 by a [illegible] which was terminated by [illegible] entered [illegible] 1, 1941. Thereafter [illegible] proceedings [illegible] some six months [illegible] adjudicated, the last two of which [illegible] 4232, in which [illegible] Nos. 310 and 311, [illegible] present appeal is based [illegible] to pay $250 attorneys' fees [illegible] petitioner in defending the two [illegible].

[illegible] filed a motion to dismiss the petition for the following [illegible] on a respondent [illegible] court; (2) that the [illegible] Trade Commission [illegible] 6, 1942 by the [illegible] (3) that [illegible] bond by petitioner; and (4) [illegible] cause of action.

With respect to the third ground, we have on several occasions determined this question adversely to respondent, and our reasons therefor will be found in opinions heretofore filed (Gen. No. 41682, 313 Ill. App. 264, Abst.; Gen. No. 41709, 313 Ill. App. 265, Abst.; and Gen. No. 42392, 318 Ill. App. 640, Abst.).

The first contention is predicated on rule 60, section 6 of the Superior court, which reads: "All applications to change or modify a final order or decree concerning alimony or the custody of children shall be by petition in writing verified by affidavit. Upon the filing and presentation thereof in satisfactory form the Court shall enter a rule on the respondent to plead, by a short day to be fixed by the Court, after service upon him of the rule and of a copy of the petition. Issues joined on such petition shall be heard at such time as the Court may order. The Court on motion of either party or on its own motion may, in its discretion, refer the matter to a Master in Chancery as in other cases." It is urged that serving notice of the filing of the petition on the attorneys who represented the respondent during the pendency of the divorce suit or other proceedings is not a sufficient compliance with the requirements of rule 60; that the relationship between a litigant and his attorney ceases upon the termination of the suit, and the filing of a petition constitutes the beginning of a new suit. Druce v. Druce, 313 Ill. App. 169, Jackson v. Jackson, 294 Ill. App. 508, and Des Chatelets v. Des Chatelets, 292 Ill. App. 357, are cited in support of these contentions. The Druce case does not pass upon the question under consideration and is no authority for the contention made. In the Jackson and Des Chatelets cases the only questions involved were whether a petition filed after divorce decree had been entered, to enforce payment of alimony or to modify an order

satisfactory form

affecting the custody of the children, is a suit or proceeding within the meaning of the statute relating to changes of venue (Ill. Rev. Stat. 1937, ch. 146, par. 1). We know of no case which holds that an application for solicitors' fees and expenses growing out of litigated divorce proceedings, constitutes a new suit, and counsel cite none. It is a common form of procedure approved for decades, and so far as we know it has never before been questioned.

It is next urged that the petition was improperly presented before Judge Schwartz, in violation of a general order entered July 6, 1942 by an Executive Committee of the Superior court. Counsel indulge in a lengthy argument setting forth the order of the Executive Committee in question and purporting to demonstrate that the cause should have been heard by Judge Nelson, from whom plaintiff had previously taken a change of venue. However, no report of trial proceedings is incorporated in the transcript of the record, and accordingly we have no means of knowing how the matter happened to be heard by Judge Schwartz, except the statement of petitioner's counsel that the Executive Committee had previously assigned the cause to Judge Lewe, and when the latter was transferred to the law side of the court Judge Schwartz succeeded to his chancery call. Without any other showing, we assume that Judge Schwartz properly heard the cause. Certainly no petition for change of venue was presented to Judge Schwartz and apparently respondent was satisfied to have him pass upon the petition.

The remaining contention is that the award of $750 for solicitors' fees and $100 for expenses is excessive. The order from which this appeal is taken recites that "the Court having heard evidence in support of the said petition

for allowance of attorney's fees and of cash outlays; no evidence having been offered or adduced on behalf of the defendant; and the Court being fully in the premises, *** finds *** that a reasonable, customary and usual compensation for such services, at the time the same were rendered, when such compensation was by contract or agreement between attorney and client in the said City and County, was the sum of Seven Hundred Fifty Dollars ($750), and that the plaintiff *** necessarily expended for stenographic and printing services the sum of One Hundred Dollars ($100)." Again it should be noted that no report of proceedings appears in the transcript of record, and we must therefore assume that the allowance was based on competent evidence and that the amount awarded is fair and reasonable. We are thoroughly familiar with the questions involved in appeals numbered 42392 and 42393. In the former, defendant raised ten separate points as ground for reversal, and in the latter, five separate points were urged and argued. We assume that a showing was made before Judge Schwartz as to the nature and extent of the services performed, as well as the issues and questions involved, and that he predicated his order on the undisputed testimony adduced before him.

We find no convincing reason for reversal of the order from which this appeal is taken, and it is therefore affirmed.

ORDER AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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the issues and [illegible]
order on the [illegible]

We find no [illegible]
order from which this [illegible]
affirmed.

Beamish and Sullivan, [illegible], concur.

42739

321 I.A. 631

E. J. POWERS, Appellee,

v.

OSCAR E. ERICKSON, d/b/a THE LEADER, BISMARCK, NORTH DAKOTA, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

February 3, 1939 the parties hereto entered into a written agreement whereby plaintiff undertook to represent defendant, the owner of a newspaper in Bismarck, North Dakota, as exclusive national advertising representative in all states except North Dakota and Minnesota. He was to maintain offices in Chicago and New York and solicit advertising, for which he was to be paid a commission of 20 per cent on all contracts secured. The agreement covered a period of three years, and was renewable for successive periods of two years each unless either party gave written notice of his desire to terminate. Subsequently in April 1941 plaintiff, who was designated in the contract as "E. J. Powers of Chicago, Illinois," claiming that defendant had failed or refused to pay commissions due, brought an attachment suit in the Municipal court of Chicago, naming McCann-Erickson Company, whose office is in Chicago, as garnishee. Summons was served, and the McCann Company answered that it held $91.63 of the defendant's money. Plaintiff sought an accounting, and his statement of claim set forth specifically several advertisers from whom he had secured contracts, giving the dates for which the advertising was to run, and the amount of space taken, for which there were alleged to be due specific commissions without regard to an accounting on other items of advertising secured. Defendant first moved to dismiss the suit on the ground that the

Municipal court had no jurisdiction to order an accounting; that motion was overruled. Subsequently defendant moved to dismiss the suit on the ground that the court lacked jurisdiction of the subject matter in that the claim stated by plaintiff did not arise within the City of Chicago; the court also overruled that motion. Defendant thereupon answered and interposed a counterclaim, in which he alleged that plaintiff had collected $307.30 without accounting therefor, but made no special denial of the specific items of commission alleged to be due. Upon the pleadings presented the court, after deducting $307.30 on defendant's counterclaim, allowed plaintiff the sum of $892.70, for which judgment was entered. Defendant appeals.

As the two principal grounds for reversal it is urged (1) that the Municipal court of Chicago had no jurisdiction to hear and determine the issues involved because the transaction from which the cause of action arose occurred outside the territorial limits of the city, and (2) that under plaintiff's statement of claim no accurate amount in damages could be determined without an accounting between the parties, which could be had only in a court of general equity jurisdiction, which jurisdiction the Municipal court does not possess. Notwithstanding the recital in the contract that plaintiff is "of Chicago," defendant argues that he is a resident of Du Page county, and that since defendant admittedly resides in Bismarck, North Dakota, the Municipal court lacked jurisdiction to hear and determine the controversy, because the cause of action occurred outside of the city. In the view we take it is unnecessary to determine that question because the suit was brought under the Attachment Act (Ill. Rev. Stat. 1943, ch. 11, secs. 1, 1a and 34 (pars. 1, 12 and 34)), the provisions of which expressly grant jurisdiction. Section 29 of the Municipal

Court Act (Ill. Rev. Stat. 1943, ch. 37, par. 384) provides: "But the requirement that the defendant *** must reside or be found within the district in which suit is brought shall not apply to attachment suits *** brought against non-residents of this state, which suits may be brought in any district when *** any garnishee resides or is found in such district ***." Section 48 (par. 403) of the same act covers the practice in attachment suits as follows: "That the practice and proceedings in the Municipal Court, other than the mode of trial and the proceedings subsequent to trial, in cases of attachment *** shall be the same, as near as may be, as that which is now prescribed by law for similar cases in other courts of record ***." Section 1 (par. 1) of the Attachment Act provides that attachments may issue where the debtor is a non-resident of the state, and section 1a (par. 1a) that the venue provisions applicable to other civil cases shall apply to attachments, and adds: "in addition thereto, attachment proceedings may be brought in the County where property or credits of the debtor are found." Section 34 (par. 34) of the Attachment Act provides: "When the defendant has been served with the writ, or appears to the action, the judgment shall have the same force and effect as in suits commenced by summons; and execution may issue thereon, not only against the property attached, but the other property of the defendant." Since in the instant case defendant entered its general appearance in the attachment suit and filed a counterclaim, we think that under the provisions of the Attachment Act and the Municipal Court Act the court was vested with jurisdiction to render a judgment against defendant. Therefore, it is immaterial whether the cause of action did or did not arise within the City of Chicago.

With respect to the contention that the Municipal court had no jurisdiction because an accounting was sought, and only a

Court Act (Ill. Rev. Stat., [illegible]) [illegible]
"But the requirement that the [illegible] or be
found within the [illegible]
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34 (par. 34) of the attachment act [illegible] "When the garnishment
has been served with the writ, [illegible] to the defendant, the
judgment shall have the same force [illegible] in suits
commenced by summons; and [illegible] only in [illegible],
only against the property [illegible]
of the defendant." Since in the [illegible]
its general appearance in the [illegible]
counterclaim, we think that [illegible]
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jurisdiction to render a [illegible]
it is immaterial whether the [illegible]
arise within the City of Chicago.

With respect to the [illegible] municipal court
had no jurisdiction [illegible] and only a

court of equity has jurisdiction to render an accounting, it should be noted that the complaint set forth in detail the specific advertising obtained, the dates thereof, the total value of the advertising and that plaintiff was entitled to 20 per cent of the amount set forth. It therefore became a simple matter of computation to determine the percantage, and there being no denial that the advertising set up in the complaint was inserted in defendant's paper nor the amount of space thereof, the court was justified, upon the computation made, in awarding plaintiff the amount claimed, less $307.30, which plaintiff had failed to turn over to defendant on collections made.

In addition to the two principal grounds urged, defendant contends that the court erred in entering judgment on the pleadings because it had demanded trial by jury and was therefore entitled to have a jury pass upon the questions presented. There is no merit to this contention. The judgment which the court entered was predicated upon the admissions in the pleadings and on defendant's answer, and full credit was given for the amount asked in the counterclaim. As to the commissions claimed by plaintiff, which were specified in the statement of claim, there was no specific denial, and consequently they were assumed to be admitted.

For the reasons indicated we are of opinion that the judgment was properly entered, and it is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

42850

321 I.A. 631

BETTY GOMEZ,
Appellee,

v.

ISADORE ROSENBLATT, doing business as the Silver Rail,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was struck on the head and injured by a metal object falling from the flush box of a toilet in defendant's tavern. Her suit for damages resulted in a verdict and judgment for $450. At the close of plaintiff's case and again at the close of all the evidence, defendant moved for a directed verdict, and after the verdict had been returned by the jury he asked judgment notwithstanding the verdict. All these motions were denied. Defendant does not argue any error because of the court's failure to grant a new trial nor does he contend that the verdict was contrary to the manifest weight of the evidence. The sole ground urged for reversal is that the court refused to direct a verdict in his favor or failed to enter judgment notwithstanding the verdict. Therefore, the question presented for determination is whether the evidence, viewed in the light most favorable to plaintiff, is sufficient to sustain the verdict and judgment. LeMenager v. Northwestern S. & W. Co., 301 Ill. App. 260; Neering v. I. C. R. R. Co., 383 Ill. 366.

The gravamen of the amended complaint is that defendant operated a tavern which the general public, including plaintiff, were invited to patronize; that it was defendant's duty to keep the premises in a reasonably safe condition; that August 2, 1942, and for a long time prior thereto, defendant permitted a steel weight of about five pounds to remain in a flush box in an unsafe condition, by reason of which it became loose and fell, striking plaintiff and inflicting injuries upon her; that defendant, by

the exercise of reasonable and ordinary care, should have known said dangerous and unsafe condition existed, and remedied the same; that defendant provided said flush box for the use of the plaintiff and others upon said premises; and that the flush box and premises were entirely under his control and supervision. Defendant's answer admitted that he owned and operated the tavern, but he denied all the other allegations of the complaint, and averred that plaintiff's injuries resulted from her own acts.

Earl Hagberg, a policeman, stated that he was notified of the accident at defendant's tavern located at 91st street and Commercial avenue through a radio call; that he went to the washroom and there saw two articles, the drip level and chain, and the siphon, both of which were introduced in evidence, lying on the floor. He was permitted to testify, over objection, that a portion of the drip level was missing and that it had "rusted off," and the cross arm, referring to the drip level, was broken off, but he did not know when it had been broken; that the weight was a cylindrical contrivance weighing about three to five pounds, and with respect to the drip level produced by defendant on trial, he said: "I am sure that this is not the one I saw that evening," that the one he saw "was rusty, it was straight, there was no hook to it."

Mrs. Mary Schol testified that she and plaintiff had visited the tavern with one States, purchased some beer, and that plaintiff then went to the washroom; that when she pulled the chain something flew out of the flush box and struck her on the head, producing blood and causing apparent dizziness; that she reported the accident to defendant; that after the accident the squad car took plaintiff to the hospital for treatment; that the witness had often visited the tavern before the accident and frequently used the toilet, which

the exercise of [illegible] reasonable [illegible] by [illegible] known said [illegible] and [illegible] the [illegible] [illegible] remedied the same; that defendant [illegible] for the use of the [illegible] and that the [illegible] control and operation. [illegible] owned and operated the [illegible] allegations of the complaint, [illegible] injuries resulted from [illegible] defendant.

[illegible] of the [illegible] and commercial [illegible] the washroom and [illegible] chair, and the [illegible] hence, lying on the floor. [illegible] objection, that [illegible] that it had "passed off". [illegible] drip level, was [illegible] been broken; that the [illegible] nothing about [illegible] drip level produced by [illegible] same that this is not the one [illegible] one he saw "[illegible] to it."

[illegible] had visited the [illegible] and that plaintiff then went to [illegible] pulled [illegible] stuck her on the head, [illegible] disastrous; then she reported the [illegible] after the [illegible] for treatment; that the [illegible] before the [illegible]

was "O. K." before the accident.

Testifying in her own behalf, plaintiff stated that she was employed as a welder, and on the night of the accident visited defendant's tavern with Mrs. Schol and a man named States; that she went to the washroom and as she flushed the toilet something flew out of the flush box and struck her head; that she was taken to the South Chicago Hospital, where Dr. Stern gave her first aid and treatment, and that later another physician attended her. Plaintiff had been in the tavern before, had used the washroom and previously found it in good workable order.

Defendant, when called by plaintiff for cross-examination, brought to court a drip level and siphon. He testified that these parts were in the same condition at the trial as they had been on the night of the accident, and were daily used in the flush box until the date of the trial; that he saw plaintiff after the accident, but observed no marks and no blood; that later in the evening he visited the washroom and saw some objects on the floor, and upon examination discovered from where they were missing; that he left them there until the next day, when the plumber came and replaced them; that he saw plaintiff again that night in the presence of her husband, talked to her, and that she appeared to be all right but complained of a headache.

Defendant offered the testimony of William Nowicki, a bartender, who said that he used the washroom once or twice a day and had been there about half an hour before the accident, when the flush box appeared to be all right; that he looked into the flush box, which was about six feet high, shortly before the accident, pulled the chain, and it appeared to be in good working condition.

Another bartender, George Marks, testified that the tavern had a ladies' and men's washroom; that he used the toilet in the ladies' room once or twice a day and that it flushed perfectly; that he used it the day before the accident and it worked

was "O. K." before the jury.

Testifying in her own behalf, [illegible] she was employed as a waitress, and on the night [illegible] visited defendant's tavern with [illegible] witnesses; that she went to the women's [illegible] toilet something flew out of the [illegible] that she was taken to the north [illegible] gave her first aid and her friend [illegible] attended her. Liability was [illegible] the waitroom and prevented [illegible]

Defendant, when called [illegible] brought to court a [illegible] parts were in the same condition [illegible] the night of the [illegible] until the date of the [illegible] test, but observed no [illegible] he visited the [illegible] upon examination [illegible] he left them there until [illegible] replaced them; that he [illegible] presence of her husband, [illegible] be all right but could find no [illegible]

Defendant offered [illegible] bartender, who said [illegible] day and had been there [illegible] when the flush box [illegible] into the flush box, which [illegible] before the accident, [illegible] in good working condition.

Another witness, [illegible] tavern had a ladies' [illegible] in the ladies' room once or twice [illegible] freely; that he used it the day before [illegible]

satisfactorily.

Defendant testified that he rented the store and had been a tenant for seven years; that the toilet rooms were in the tavern when he first took possession; that he used the toilet on the day of the accident and previously and that it had always worked satisfactorily.

Victor Hahn, a plumber, identified the drip level and siphon which were introduced in evidence, and explained that a metal bridge is fastened from front to back across the flush box or tank, and the drip level fits into a hole in the bridge and is fastened by a hook to the siphon, which in turn fits into the bottom of the flush box; that a chain is attached to the other end of the drip level and when pulled raises the siphon, discharging water into the bowl; that the siphon is then released and the water is drawn into the box. When called to the tavern he picked up both parts, reinstalled them, and they worked perfectly; and he testified that they were in the same condition at the time of the trial as when he made the repairs. In his opinion, if enough force were applied to the chain, the bridge would break, but the drip level and siphon would not come out with one pull; but if the knuckle were off the drip level, parts would come out if enough force were applied, but how much force, he did not know.

It is conceded that defendant had no actual knowledge of the condition of the flush box before the accident. Plaintiff's claim is predicated upon the theory that an old fashioned flush box would inevitably deteriorate with use, that wear and rust of its parts would occur in the ordinary course of events, creating hazards in varying degrees, which would result in a state of disrepair, and that defendant was required to provide against such hazards by a periodical inspection of the interior of the flush box. It is admitted that defendant had failed to

satisfactorily.

"Internal cavitation" [illegible] been a tendency for some years; that is [illegible] the tavern management [illegible] tolled on the day of the [illegible] had always worked [illegible] satisfactorily.

Without doubt, [illegible] siphon which were introduced in evidence, [illegible] metal bridge is fastened [illegible] box or tank, and the duty level [illegible] and is fastened by a hook to the [illegible] into the bottom of the flush box; [illegible] the other end of the duty level [illegible] siphon, which rests [illegible] then relaxed and the water is [illegible] called to the tavern to [illegible] and they worked perfectly; [illegible] the same condition at the [illegible] repairs. In this opinion, [illegible] chain, the bridge would [illegible] would not come out with one [illegible] the duty level, [illegible] supplied, but [illegible] .

It is conceded that [illegible] of the condition of the flush box [illegible] difficulties which [illegible] flush box could [illegible] part of the parts would [illegible] creating hazards in various [illegible] state of disrepair, and that [illegible] against such hazards by [illegible] of the inspector of the flush box. It is [illegible] to

make any inspection within the seven years that he operated the tavern, and his failure so to do is relied upon as negligence. Plaintiff cites Houlihan v. Sulzberger & Sons Co., 282 Ill. 76, Maton Bros. v. Central Ill. Pub. Serv. Co., 269 Ill. App. 99, Swanson v. S. S. Kresge Co., 302 Ill.App. 455, and several other decisions in support of her position. In general, these cases hold that it becomes a question of fact whether a reasonably thorough inspection of an appliance would disclose its unsafe condition, and that the person in control thereof must maintain such a reasonable system of inspection as will insure detection of defects. In the case at bar there was a conflict in the evidence as to whether the parts which had fallen to the floor were rusty and defective, but the jury had an opportunity to inspect them and to judge of the credibility of all the witnesses who testified with respect thereto. The admitted failure to inspect the flush box during the entire seven years in which defendant operated the tavern was an element for the jury's consideration in determining whether defendant negligently failed in his duty to keep the premises in a reasonably safe condition, and whether in the exercise of reasonable and ordinary care he should have discovered the dangerous condition and remedied it. On a motion for a directed verdict or for judgment notwithstanding the verdict, the court is not permitted to weigh the evidence; it merely ascertains whether there is any evidence tending to prove the allegations of the complaint.

Many of the points made in defendant's brief are not argued. Others need not be discussed in view of our conclusion that the question of negligence upon plaintiff's theory of the case was properly submitted to the jury.

Defendant complains because the court refused certain instructions tendered by him, but the instructions are not discussed in his brief and no authority or reason is cited why

make any [illegible] in the [illegible]
the tavern, [illegible]
gence. [illegible] 202 Ill. 76, [illegible]
209 Ill. [illegible] 455, and several other [illegible]
In general, these [illegible]
fact whether a reasonable [illegible]
would disclose its [illegible]
control thereof must [illegible]
inspection as will insure [illegible]
at her trial [illegible]
parts which [illegible]
but the jury [illegible]
of the credibility of [illegible]
respect thereto. [illegible]
box owning [illegible]
the tavern [illegible]
determination [illegible]
to keep the [illegible]
members in the [illegible]
would have discovered [illegible]
it. [illegible]
without [illegible]
the evidence [illegible]
dence tending to prove [illegible]

[illegible]
argued, [illegible]
that the [illegible]
case was [illegible]

[illegible]
instructions [illegible]
caused in his [illegible]

they should have been given.

Both parties in their briefs allude to the doctrine of res ipsa loquitur, but plaintiff's suit was not predicated upon that doctrine, and her counsel concede that it has no application either to the pleadings or to the evidence.

From an examination of the record we are satisfied that there was evidence of negligence which was properly submitted to the jury, the cause was fairly tried, and no question is raised as to the amount of the verdict. Therefore the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

42279

ELIZABETH SCHAFFNER, Administratrix of the Estate of Frank Schaffner, Deceased, (Plaintiff) Appellant,	
v.	APPEAL FROM SUPERIOR
B. & W. AUTO SALES COMPANY, an Illinois Corporation, et al., Defendants.	COURT OF COOK COUNTY.
B. & W. AUTO SALES COMPANY, an Illinois Corporation, (Defendant) Appellee.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Elizabeth Schaffner, as administratrix of the estate of Frank Schaffner, deceased, brought an action against B. & W. Auto Sales Company, an Illinois corporation, and Irving O'Shea. She appeals from an order entered denying her motion for leave to insert the name of B. & W. Motor Company, Inc., "sued herein, through misnomer of said defendant, under the name of B. & W. Auto Sales Company, a corporation, in all pleadings in the cause herein wherein the name B. & W. Auto Sales Company appears."

The complaint filed charges that B. & W. Auto Sales Company, an Illinois corporation, on September 29, 1940, negligently operated an automobile through its agent, Irving O'Shea, thereby causing the death of plaintiff's intestate. A summons was issued against said Company and the sheriff's return showed service upon it. On December 13, 1940, two months and a half after the accident, defendant Auto Sales Company filed an answer in which it denies that it drove, operated or maintained the automobile in question as alleged in the complaint, and denies that Irving O'Shea, defendant, was operating and driving an automobile in and about the business of the defendant B. & W. Auto Sales Company, at the time and place in question, as

the agent and servant of said Company, and further denies "that it was responsible for any of the acts of negligence or conduct allegedly committed by the said Irving O'Shea." On November 17, 1941, plaintiff presented to Judge Michael L. McKinley the followung unverified motion:

"Now comes Elizabeth Schaeffner, administratrix of the estate of Frank Schaeffner, deceased, plaintiff herein, by and through Joseph Barbera, her attorney, and respectfully moves the court for leave to insert the name of defendant, B. & W. Motor Company, Inc., sued in the cause herein under the name of B. & W. Auto Sales Company, a corporation, in all pleadings in the cause herein wherein the name B. & W. Auto Sales Company appears; and as grounds for said motion says:

"1. That at the time of the filing of the complaint herein the B. & W. Auto Sales Company had been liquidated and was no longer in corporate existence.

"2. That at the time of the accident herein, and at the time of the filing of the suit herein, all of the assets of the B. & W. Auto Sales Company had been purchased and acquired by the B. & W. Motor Company, Inc.

"3. That the real party in interest, and the one sued and intended to be sued, was the B. & W. Motor Company, Inc.

"4. That the co-defendant, Irving O'Shea, sued herein as the agent and servant of B. & W. Auto Sales Company, was in fact the agent and servant of B. & W. Motor Company, Inc.

"5. That the party actually served with summons in the cause herein was the B. & W. Motor Company, Inc.

"6. That the appearance and answer filed herein by the B. & W. Auto Sales Company was in fact the appearance and answer of B. & W. Motor Company, Inc.

"Joseph Barbera
"Attorney for Plaintiff"

On December 3, 1941, Judge McKinley entered the following order:

"This cause coming on to be heard upon the motion of the plaintiff for leave to insert the name of B & W Motor Company, Incorporated, on all pleadings in this cause in lieu of B & W Auto Sales Company, a corporation, and thereby make B & W Motor Company, Incorporated, a corporation, a party to this cause;

"And the Court having heard the arguments of counsel and being fully advised in the premises, doth find:

"First: On November 16, 1940, plaintiff filed her complaint of this cause and caused summons to be issued against defendants, B & W Auto Sales Company, an Illinois corporation, and Irving O'Shea.

"Second: Said complaint alleged a cause of action based upon a claim for the wrongful death of the plaintiff's intestate out of an accident occurring on September 29, 1940.

"Third: Both on the date of said accident and on the date said complaint was filed herein, there was in existence in the State of Illinois, a corporation known as B & W Auto Sales Company, a corporation, and on each of said days, there was in existence in the State of Illinois a corporation known as B & W Motor Company, a corporation, each of which was a corporate entity on each of such dates.

"Fourth: The original summons in this cause was served upon Edward Campbell, who was, at the date thereof, an officer of B & W Motor Company.

"Fifth: B & W Auto Sales Company had disposed of its tangible assets and at least in part to B & W Motor Company prior to September 29, 1940, and B & W Auto Sales Company was not then engaged in carrying on any business

[illegible]

[illegible] Decreed, [illegible] entered the following order:

"[illegible] the plaintiff [illegible] company, [illegible] list of [illegible] same [illegible] company, [illegible] property to this order;

"[illegible] and doing [illegible]:

"First: [illegible] liabilities of this [illegible] defendants, [illegible] and living [illegible].

"Second: [illegible] based upon [illegible] indebtedness [illegible].

"Third: [illegible] the late said company was [illegible] ence in the title of [illegible] auto sales company, [illegible] there was in [illegible] known as [illegible] was a corporate [illegible].

"Fourth: [illegible] served upon [illegible] an officer of [illegible].

"Fifth: [illegible] its tangible [illegible] company prior to [illegible] company was not [illegible] business

other than liquidating its assets.

"Sixth: Irving O'Shea was an employee of B & W Motor Company on September 29, 1940, but by this finding the Court is not determining that he was its agent at the time and place of the accident alleged in plaintiff's complaint.

"Seventh: The plaintiff's motion to substitute B & W Motor Company for B & W Auto Sales Company does not present a question of misnomer but rather a mistake in the identity of the person to be sued; the period of limitations prescribed by law had expired before such motion was presented; and the plaintiff may not now make B & W Motor Company, a corporation, a party to this action in that the alleged cause of action set forth in the plaintiff's complaint is now barred as to it.

"Eighth: Plaintiff's alleged cause of action is barred as to the B & W Motor Company.

"IT IS THEREFORE ORDERED that the plaintiff's motion to amend all pleadings in this cause by inserting the name B & W Motor Company as a defendant herein in lieu of B & W Auto Sales Company be, and it hereby is, denied, with prejudice."

No transcript or report of proceedings of the hearing before Judge McKinley was preserved by plaintiff and no further action was taken by her in the cause until March 19, 1942, when she presented the following verified motion before Judge Lindsay:

"Now comes Elizabeth Schaeffner, administratrix of the estate of Frank Schaeffner, deceased, plaintiff herein, by and through Joseph Barbera, one of her attorneys, and respectfully moves the court for leave to insert the name of the defendant, B.& W. Motor Company, Inc., sued herein, through misnomer of said defendant, under the name of B. & W. Auto Sales Company, a corporation, in all pleadings in the cause herein wherein

other than [illegible] the [illegible].

"Sixth: [illegible]

Motor Company on [illegible] the [illegible] the court is not [illegible] time and place of the [illegible] filed in [illegible] complaint.

"Seventh: [illegible] motion to [illegible] Motor Company for [illegible] does not [illegible] question of minimum [illegible] the [illegible] of the person to be sued; the [illegible] of [illegible] by law had expired before such [illegible] plaintiff may not now [illegible] Motor Company, a [illegible] a party to this action [illegible] set forth in the [illegible] to [illegible] barred as to the [illegible] Motor Company.

"Eighth: [illegible] motion [illegible] to among all plaintiffs in this [illegible] by [illegible] Motor Company as a [illegible] into Allen Company by, [illegible] with prejudice."

To transcript or report of proceedings of the hearing before Judge [illegible] of [illegible] motion was taken by [illegible] in the [illegible] she presented the following verbal motion to [illegible] Lindsey:

"Now comes [illegible] the [illegible] estate of Frank [illegible] through Joseph [illegible] moves the court for [illegible] P. & M. Motor Company, Inc., and [illegible] said defendant, under the name of [illegible] Motor Company, a corporation, in [illegible] pleadings in the [illegible] [illegible]

the name of B. & W. Auto Sales Company appears; and as grounds for said motion says:

"1. That prior to and at the time of the filing of the complaint herein the B. & W. Auto Sales Company was being liquidated and was not actively engaged in any business.

"2. That prior to and at the time of the accident herein, and at the time of the filing of the suit herein, all of the assets of the B. & W. Auto Sales Company had been purchased and acquired by the defendant, B. & W. Motor Company, Inc.

"3. That the real party in interest, and the one sued, and intended to be sued, was the B. & W. Motor Company, Inc.

"4. That the automobile involved in the accident herein was owned by the B. & W. Motor Company, Inc., and at the time of the accident herein was operated by one of its agents and servants, Irving O'Shea.

"5. That the co-defendant, Irving O'Shea, sued herein as the agent and servant of B. & W. Auto Sales Company was in fact the agent and servant of the B. & W. Motor Company, Inc.

"6. That the party actually served with summons herein was the B. & W. Motor Company, Inc.

"7. That the appearance and answer filed herein by the B. & W. Auto Sales Company was in fact the appearance and answer of the B. & W. Motor Company, Inc.

"8. That plaintiff's only cause of action has been and is against the B. & W. Motor Company, Inc., and Irving O'Shea.

"Joseph Barbera"

On March 30, 1942, Judge Lindsay entered the following order:

"This cause coming on to be heard upon the sworn motion of the plaintiff for leave to amend the complaint by inserting the name of B. & W. Motor Company, Inc., a corporation,

the mass of [illegible] Motor Company [illegible]

[illegible]ronds for [illegible] section says:

"1. [illegible]

the [illegible] line [illegible]

limited and [illegible] engine [illegible] breakdown.

"2. [illegible]

[illegible] month, and [illegible] the time of the [illegible]

of the [illegible] of the [illegible]

[illegible]

"3. [illegible]

and inherent to [illegible]

"4. [illegible]

[illegible] was [illegible]

the time of the [illegible] was [illegible] by one of its

agents [illegible] during [illegible]

"5. [illegible]

[illegible] as the [illegible]

[illegible] in fact the [illegible]

Company, Inc.

"6. [illegible]

[illegible] was [illegible]

"7. [illegible]

the [illegible]

and [illegible] of the [illegible] Motor [illegible]

"8. [illegible]

and is [illegible]

[illegible]

[illegible]

[illegible] 5, 6 [illegible] following order:

"This [illegible]

motion of the [illegible] but by

[illegible] the mass of [illegible] Motor Company, Inc., [illegible]

in lieu of B. & W. Auto Sales Company, a corporation:

"And it appearing to the court that such motion should be denied;

"And it appearing to the court from plaintiff's motion under oath that the only cause of action claimed by her is against B. & W. Motor Company, a corporation:

"It Is Therefore Ordered that the plaintiff's verified motion for leave to amend the complaint by inserting the name of B. & W. Motor Company, Inc., a corporation, in lieu of B. & W. Auto Sales Company, a corporation, be and it is hereby denied, to the entry of which order the plaintiff objects and excepts.

"It Is Further Ordered, it appearing from the plaintiff's motion under oath, that the only alleged cause of action claimed by her is against B. & W. Motor Company, Inc., that this cause be and it is hereby dismissed as to B. & W. Auto Sales Company, a corporation, and that said B. & W. Auto Sales Company, a corporation, do have and recover of and from the plaintiff its costs in this behalf expended, and that execution issue therefor."

No transcript or report of proceedings of the hearing before Judge Lindsay was preserved by plaintiff. Plaintiff appeals from the order entered by Judge Lindsay and in the notice of appeal prays that the order entered by him be reversed, "and the cause herein be remanded for trial with directions to the Superior Court of Cook County, Illinois, to grant plaintiff-appellant leave to amend all pleadings by inserting the name of the defendant, B. & W. Motor Company, Inc., sued herein, through misnomer of said defendant, under the name of B. & W. Auto Sales Company, a corporation, in all pleadings in the cause herein wherein the name B. & W. Auto Sales Company appears."

The following is plaintiff's theory of the case:

in lieu of [illegible]

"And it [illegible] be denied;

"And it [illegible] sum of [illegible] against E. [illegible]

"It is [illegible] fied motion for [illegible] the name of [illegible] of E. & [illegible] hereby denied, to the entry [illegible] objection and exceptions.

"It is [illegible] to the [illegible] tiff's motion [illegible] claimed by her in [illegible] this cause be and it is [illegible] Lodge Company, a [illegible] to pay, a corporation, [illegible] plaintiff [illegible] exoneration issue [illegible]."

In [illegible] before Judge Hinkey [illegible] appeals from the [illegible] notice of appeal [illegible] reversed, [illegible] directions to [illegible] to grant plaintiff - [illegible] by inserting the [illegible] company, inc., [illegible] ant, under the name of [illegible] poration, in all [illegible] name [illegible] & [illegible] Lodge [illegible]."

The following is [illegible] of the case:

"That since the B. & W. Motor Company, Inc., was actually served with summons and actually filed an appearance and answer in the case, the amendment requested by the plaintiff to insert in the pleadings the name of B. & W. Motor Company, Inc., instead of the name of B. & W. Auto Sales Company, was an application to correct a misnomer and should have been granted in accordance with Sections 21 and 46 of the Civil Practice Act."

Defendant states its theory of the case as follows: "(1) that Auto Sales Company and Motor Company were separate and distinct corporations, and that the plaintiff sued Auto Sales Company even though through a mistake of identity, and she now concludes it is the wrong company; (2) that the ruling and findings of Judge McKinley are not a nullity but are binding on the parties; and (3) as no transcript or report of proceedings was preserved upon either of these motions, the findings of the Trial Court cannot be attacked by the plaintiff;" that "where a plaintiff is mistaken in the identity of the person against whom he has a cause of action it is not a case of misnomer and the court will not permit all of the pleadings to be amended by substituting the name of a different party."

It will be noted that the motion made before Judge McKinley was filed eleven months after B. & W. Auto Sales Company, defendant, had filed an answer in which it denied that it or its servant had any connection with the accident in question. In spite of this plain notice counsel for plaintiff took no steps to remedy the situation until more than one year after the accident. It will be further noted that the motion before Judge Lindsay was, in substance, the same as the motion that Judge McKinley had passed upon. Plaintiff concedes, as she must, that by her motions she sought to amend all the pleadings, including the Auto Sales

"That other for [illegible] company, [illegible] served with a [illegible] answer in the bill, [illegible] to [illegible] Inc., instead of the name of [illegible] an application to amend [illegible] granted in accordance with sections 21 and 45 of the Civil Practice Act."

Defendant states [illegible] (1) that [illegible] also [illegible] all distinct corporations, [illegible] sales [illegible] she now [illegible] ruling and findings of [illegible] are binding on the [illegible] report of [illegible] motions, the [illegible] of the [illegible] by the plaintiff; [illegible] the identity of the [illegible] notion it is not [illegible] permit all of the [illegible] name of a different party."

It will be [illegible] Pellinsky was filed eleven [illegible] Company, defendant, [illegible] that it or its [illegible] in question. [illegible] plaintiff [illegible] than one year [illegible] that the notice [illegible] same as the [illegible] Plaintiff concedes, [illegible] sought to amend all [illegible]

Company's answer, so that the pleadings would show that the B. & W. Motor Company was the party originally sued. It is clear, as defendant contends, that plaintiff did not bring in the Motor Company as a new party defendant because the period of time provided by the Injuries Act for the commencement of an action under that statute had expired.

Plaintiff contends that Judge McKinley heard no evidence and that the findings he made in the order entered by him were merely the Judge's conclusions on the pleadings, and that his order must be considered as a determination by the Judge of a question of law, and therefore it was not necessary for plaintiff to obtain a report of proceedings. Defendant contends that for aught shown by the record Judge McKinley's findings were based upon an oral stipulation of facts or upon evidence heard, and that the contention of plaintiff that Judge McKinley's findings of fact must be treated merely as conclusions of law, based upon the pleadings, is without merit. We are satisfied that we cannot in this proceeding disregard the findings of fact made by Judge McKinley. The motion made by plaintiff before Judge Lindsay was apparently based upon the assumption that Judge Lindsay could sit in review upon Judge McKinley's order.

But, in any view of this appeal, there are facts found by Judge McKinley that are undisputed and that determine this appeal adversely to plaintiff. The findings are:

"First: On November 16, 1940, plaintiff filed her complaint of this cause and caused summons to be issued against defendants, B & W Auto Sales Company, an Illinois corporation, and Irving O'Shea.

"Second: Said complaint alleged a cause of action based upon a claim for the wrongful death of the plaintiff's intestate out of an accident occurring on September 29, 1940.

"Third: Both on the date of said accident and on

[illegible]

the date said complaint was filed herein, there was in existence in the State of Illinois, a corporation known as B & W Auto Sales Company, a corporation, and on each of said days, there was in existence in the State of Illinois a corporation known as B & W Motor Company, a corporation, each of which was a corporate entity on each of such dates."

In Fitzpatrick v. Pitcairn, 371 Ill. 203, the question before the Supreme court was (p. 204), "whether, in an action against an incorporated railroad company for damages on account of wrongful death, the receivers of the railroad company, who were such at the time of the accident and when the suit was begun, may, after the statutory limitation of one year for commencing suit, be added or substituted as defendants in place of the railroad company." The court held that an amended complaint against the receivers should be dismissed on motion because it was filed after the expiration of the statutory period for bringing suit, as the case is not one of misnomer but one of mistaken identity of defendant. The court held that although the receivers were in possession and control of and operating the railroad and train at the time of the accident, nevertheless, the railway corporation was in existence at that time. The plaintiff in the Fitzpatrick case certainly presented a stronger case in support of her motion than does the plaintiff in the instant case. In the Fitzpatrick case it appeared that the receivers were in possession of the railroad and operating it on the date of the accident; the summons issued against the railway company was served upon an agent of the receivers; the engineer operating the train was an employee of the receivers; the answer filed on behalf of the railway company was filed by counsel for the receivers; representatives of the receivers were present at the coroner's inquest, and agents of the receivers made an investigation of the acci-

dent. The plaintiff there claimed that under the facts the receivers should be treated as the actual party defendant from the time the suit was first instituted, and that her proposed amended complaint presented merely a question of misnomer. The court, as we have heretofore stated, refused to sustain the position of the plaintiff. Certain cases that the instant plaintiff cites were also cited in the Fitzpatrick case and the Supreme court distinguished them from the facts of that case. Other Illinois cases that are in accord with the Fitzpatrick case might be cited, but it is unnecessary to refer to them as we are bound by the ruling in the Fitzpatrick case. Plaintiff calls our attention to the fact that while the sheriff returned the summons as served upon the B. & W. Auto Sales Company, that the return shows it was served upon one Campbell and that Judge McKinley found that he was an officer of B. & W. Motor Company. The same situation was present in the Fitzpatrick case. Plaintiff, in her reply brief, argues that if B. & W. Auto Sales Company is a separate and distinct corporation from the B. & W. Motor Company, why should B. & W. Auto Sales Company be concerned with the effort of plaintiff to recover from the B. & W. Motor Company unless they are, in fact, one and the same corporation. Judge McKinley found that they were separate and distinct corporations. Moreover, it appeared in the Fitzpatrick case that the receivers took charge of the defense of the suit against the railway company.

The final contention of plaintiff is that "the statute of limitations is a personal privilege and affirmative defense and is waived by failure to plead it," and that "nowhere in the record does it appear that the question of statute of limitations, if any, was raised by the appellee either by motion, or answer, or counter-affidavit. The appellee therefore waived his right thereto, if any." The same point appears

dent. The [illegible] the
receivers [illegible]
the time [illegible]
amended [illegible]
court, as to [illegible]
position of the [illegible]
liability [illegible]
the supreme court [illegible]
case. [illegible]
liability case [illegible]
refer to them [illegible] in the liability
case. [illegible]
the sheriff [illegible]
auto [illegible]
one [illegible]
officer of [illegible]
present in the liability case, [illegible]
[illegible]
and distinct [illegible]
[illegible]
of plaintiff to recover [illegible]
they are, in [illegible]
[illegible]
tions. [illegible]
the receivers [illegible]
the railway [illegible].

The third [illegible]
sabatic of [illegible]
[illegible]
in the record [illegible]
limitations, [illegible]
motion, or [illegible]
fore waived [illegible]

to have been urged in the Fitzpatrick case and the court there said (p. 210): "Adhering to our former holdings we said the time fixed by the Injuries act for commencing an action for wrongful death is not a statute of limitations, but is a condition of the liability itself; that it is a condition precedent attached to the right to sue at all, and, being so, the plaintiff must bring himself within the prescribed requirements necessary to confer the right of action *** *."

This record presents a hard case and this court takes no pleasure is sustaining an order, that, in effect, deprives plaintiff of her cause of action, but we are bound by the law.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED,

Friend, P. J., and Sullivan, J., concur.

[illegible]

42093

JOSEPH BUCKO, Sr., and MARY BUCKO, his wife, Plaintiffs below.	
JOSEPH BUCKO, Sr., Appellant,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
JOSEPH BUCKO, Jr., and JULIA BUCKO, his wife, and JOSEPH SZESZYCKI and STELLA SZESZYCKI, his wife, Appellees.	

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The complaint herein, consisting of two counts, was filed by Joseph Bucko, Sr., and Mary Bucko, his wife. In the first count they charged Joseph Szeszycki and Stella Szeszycki, his wife, with breach of warranty of a certain deed. In the second count they charged the defendants named in the first count and Joseph Bucko, Jr., and Julia Bucko, his wife, with fraud and conspiracy. Both counts conclude with a prayer for the recovery of $5,500 damages alleged to have been sustained by plaintiffs. A motion was made to strike both counts of the complaint on the ground that neither count sufficiently stated a cause of action against defendants or either of them and to dismiss the complaint because both counts thereof were barred by the Statute of Limitations. The trial court found "from the face of the pleadings that the cause of action set forth in plaintiffs' complaint is barred by the statute of limitations" and ordered the suit dismissed. Plaintiffs appeal from said order. The death of plaintiff Mary Bucko, having been suggested during the pendency of this appeal, her surviving husband, Joseph Bucko, Sr., is now the sole appellant.

The first count of the complaint alleges substantially that plaintiffs entered into a written contract with defendants, Joseph Szeszycki and Stella Szeszycki, his wife, to purchase

from said defendants "the undivided one-half (1/2) in joint tenancy" of certain described premises; that said defendants "agreed to convey to plaintiffs good title to the property by deed;" that the two defendants by their deed of January 29, 1931 "conveyed and warranted to plaintiffs, their heirs or assigns in fee simple the real estate in question;" that "said defendants did by their deed covenant among other things that at the time of the making and delivery of said deed they were lawfully seized of an indefeasible title in and to said real property and that they had full right and power to convey same;" that defendants "warranted to plaintiffs, their heirs and assigns the quiet and peaceable possession of said property;" that "they would defend the title thereto against all persons who might lawfully claim the same;" that defendants "at the time of the execution and delivery of the warranty deed to plaintiffs were not lawfully seized of an indefeasible title in fee simple in and to the said property and did not then have full right and power to convey same;" that one Michalina Szeszycki and Teofil Szeszycki, her husband, claimed at the time of the making and delivery of the aforementioned warranty deed and Michalina Szeszycki (Teofil Szeszycki, her husband, having since died) continued to claim lawful right and title to said property; that on July 17, 1935, Michalina Szeszycki filed her complaint in the Superior court of Cook county to foreclose a trust deed held by her against the property involved herein; that pursuant to decisions of the Appellate and Supreme courts of this state, a decree of the Superior court of Cook county and a judgment of the Municipal court of Chicago, plaintiffs were evicted from this property by due process of law and still remain out of possession thereof. The complaint sets forth the numbers of the cases in the respective courts, the decisions of which resulted in the eviction of plaintiffs from the aforesaid property.

from said defendants "[illegible] valid one-half (1/[illegible]) [illegible] tenancy" of certain [illegible] "agreed to convey to [illegible] the property by deed;" that the [illegible] 1921 "conveyed and [illegible] assigns in fee [illegible]; that defendants did by their [illegible] the time of the [illegible] fully seized of an indefeasible [illegible] and that they had full [illegible]" but defendants "[illegible] quiet and peaceable possession of [illegible]; that "they would defend the title thereto against [illegible] lawfully claim the same;" [illegible] execution and delivery of [illegible] not lawfully seized of an indefeasible [illegible] and to the said property [illegible] power to convey same; that [illegible] Teofil Sassayewa, her husband, [illegible] delivery of the [illegible] Sassayewa (Teofil Sassayewa, her husband, [illegible] continued to claim [illegible] that on July 12, 1927, [illegible] in the Superior Court of Cook County [illegible] held by her against the [illegible] to decisions of the [illegible] a decree of the Superior Court [illegible] of the Municipal Court of Chicago, [illegible] this property by due process of [illegible] one of possession thereof. The [illegible] cases in the respective courts, [illegible] in the eviction of plaintiffs from the said property.

Defendants in their brief filed in this court do not even attempt to sustain the order of the trial court in so far as it held that the first count was barred by the Statute of Limitations. The only point they urge here in respect to the first count is that "it is insufficient in law and sets up no cause of action" and then advances a few frivilous objections to such count that do not merit serious consideration.

The first count of the complaint is for breach of warranty. The deed containing the warranty was executed January 29, 1931. The complaint herein was filed May 11, 1940, which was well within the ten-year limitation period provided by statute (par. 17, sec. 16, chap. 83, Ill. Rev. Stat. 1939.)

The second count of the complaint charges the defendants named in the first count and two others, Joseph Bucko, Jr., and Julia Bucko, his wife, with fraud and conspiracy in procuring plaintiffs to purchase the property in question. The only allegations of the second count that even purport to charge fraud and conspiracy averred that "on the 17th day of July, 1930, one Teofil Szeszycki and Michalina Szeszycki, his wife (the parents of two of the defendants, Julia Bucko and Joseph Szeszycki), by warranty deed conveyed to Joseph Bucko, Jr., and Julia Bucko, his wife, defendants, the undivided one-half (1/2) in joint tenancy and by warranty deed conveyed to Joseph Szeszycki and Stella Szeszycki, his wife, another undivided one-half (1/2) in joint tenancy of the property known as 926 West 33rd Street," which was described therein; that "thereafter and prior to the 15th day of December, 1930, the four defendants hereinabove named, entered into a conspiracy with each other for the purpose of defrauding the plaintiffs, and in accordance with said conspiracy to defraud, the four defendants and each of them represented to the plaintiffs that the defendants, Joseph Szeszycki and Stella Szeszycki, his wife were lawfully seized of an indefeasible estate in fee simple, in and to the undivided one-half (1/2) of the property herein-

above described;" that said "defendants further did fraudulently and falsely and knowing the falsity of said representations represented to the plaintiffs that a transfer by the two defendants, Joseph Szeszycki and Stella Szeszycki to the plaintiffs of the undivided one-half (1/2) interest will give these plaintiffs title free and clear, without any incumbrances thereon whatsoever and further falsely and fraudulently with the intent to defraud these plaintiffs, the said four defendants, and each of them, represented to the plaintiffs, said defendants at all times knowing that said representations are false, while the plaintiffs did not know these representations to be false, that the defendants, Joseph Szeszycki and Stella Szeszycki, would defend plaintiffs' title to the undivided one-half (1/2) interest of the property herein described against all persons who might lawfully claim the same." It appears from the second count of the complaint that two of the defendants, Joseph Bucko, Jr., and Julia Bucko, his wife, are the son and daughter-in-law of the surviving plaintiff-appellant, Joseph Bucko, Sr.

The second count is clearly barred by the Statute of Limitations and the trial court properly sustained the motion to dismiss same. The various fraudulent representations were alleged to have been made by defendants at or prior to the time the deed was executed on January 29, 1931 and the complaint was not filed until May 11, 1940. The statute provides a five-year limitation for actions of this character. (Par. 16, sec. 15, chap. 83, Ill. Rev. Stat. 1939.) But appellant urges that because the fraud was not discovered until the filing of the complaint to foreclose by the surviving mortgagee, Michalina Szeszycki, on July 17, 1935, the limitation period did not begin to run until said date under section 22 of the Limitation Act (par. 23, sec. 22, chap. 83, Ill. Rev. Stat. 1939), which is as follows:

"If a person liable to an action fraudulently con-

[illegible]

is as follows:

"If a person [illegible] con-

ceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards."

There is not a single allegation in the second count of the complaint either by way of fact or conclusion that defendants fraudulently concealed from plaintiffs the purported cause of action set forth in said count by affirmative acts or representations or otherwise. It has been repeatedly held that for this section of the statute to be applicable the concealment must consist of affirmative acts or representations. In Lancaster v. Springer, 239 Ill. 472, the court stated at p. 482:

"The concealment of a cause of action which will prevent the operation of the Statute of Limitations must be something of an affirmative character, designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence by the person liable is not concealment of a cause of action. Such concealment must consist of affirmative acts or representations."

In Keithley v. Mutual Life Ins. Co., 271 Ill. 584, it was stated at p. 594:

"The doctrine announced in these decisions is, that the fraudulent concealment of a cause of action which will prevent the running of the Statute of Limitations must be some affirmative act or representation intended to prevent the discovery of the cause of action, which does actually prevent such discovery; that a replication setting up such fraudulent concealment must set out the facts constituting the concealment; that the fraudulent misrepresentations which form the basis of the cause of action do not constitute a fraudulent concealment in the absence of allegations of acts or representations tending fraudulently to conceal the cause of action; that the rule that the statute begins to run only from the discovery of the fraud does not apply when the party affected by the fraud might with ordinary diligence have discovered it; ***."

As already stated the statutory limitation for bringing an action of this nature is five years but appellant further claims that the statute was tolled by reason of the pendency of the litigation in connection with the foreclosure proceeding, which involved the property in question, and in support of his contention in this regard cites par. 24a of the Limitation Act (par. 24a, sec. 24, chap. 83, Ill. Rev. Stat.

[illegible]
person entitled thereto, the third [illegible]
any time within five years from the [illegible]
bring the same into every [illegible]
and not [illegible]."

There is not [illegible] of the complaint [illegible]
ants fraudulently [illegible]
of action set forth in [illegible]
representations or [illegible]
that for this reason [illegible]
concealment [illegible]
in Lonsdale v. [illegible]

482:

"The [illegible]
prevent the [illegible]
something [illegible]
and which does prevent, the [illegible]
are silence [illegible]
cause of action. [illegible]
sive [illegible]

In [illegible] v. [illegible]
was [illegible]

"The [illegible]
the fraudulent concealment [illegible]
prevent the [illegible]
some affirmative act or [illegible]
the discovery of [illegible]
prevent such discovery; that a [illegible]
fraudulent concealment [illegible]
the concealment; that [illegible]
[illegible]
a fraudulent concealment [illegible]
acts or representations [illegible]
the cause of action; [illegible]
to run only from [illegible]
when the party [illegible]
diligence have [illegible]

[illegible]
an action of this [illegible]
claims that the [illegible]
of the litigation [illegible]
ing, which involved [illegible]
of his contention [illegible]
limitation set [illegible]

1939), which provides as follows:

"In any of the actions specified in any of the sections of this act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

Even a cursory examination of this section shows its utter inapplicability to the situation presented here. The subject matter of the foreclosure proceeding is entirely foreign to the subject matter of the cause of action alleged in the count under consideration. But even if there was any remote resemblance between the two and this section of the statute was applicable, the issues in the action to foreclose were finally determined when the Supreme court at its October, 1938 term, denied leave to appeal from the judgment of the Appellate court. Inasmuch as under section 24 the limitation period would have been tolled for one year only if said section were applicable, and this action was not commenced, as already shown, until May 16, 1940, it would in any event be barred by the Statute of Limitations.

For the reasons stated herein that portion of the order of the Superior court of Cook county pertaining to the second count is affirmed but that portion thereof pertaining to the first count is reversed and the cause remanded with directions that defendants' motion to strike and dismiss the first count be denied, that defendants be required to answer the first count and that such further proceedings be had as are not inconsistent with the views expressed herein.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

1912), which provides [illegible]

In any of the [illegible]
of this act, if [illegible]
the same be reversed [illegible]
a verdict pass for the [illegible]
arrest of judgment, [illegible]
or, if the defendant be [illegible]
judging the [illegible]
such suit, the said [illegible]
administrators, [illegible]
section affords one [illegible]
against the plaintiff [illegible]

[illegible]

utter impossibility [illegible]
ject matter of the [illegible]
the subject matter of [illegible]
under consideration, [illegible]
between the two [illegible]
the issues in the action [illegible]
the supreme court [illegible]
appeal from the judgment [illegible]
under section [illegible]
for one year only [illegible]
section was not [illegible]
it works in any [illegible]

For the [illegible]
of the lower court [illegible]
court is affirmed [illegible]
first point is reversed [illegible]
that testamentary [illegible]
be denied, that [illegible]
and that such [illegible]
with the views [illegible]

[illegible]

Friend, P. J., and [illegible], concur.

42546

ALBERT E. GILL, Appellant,	)	333
v.	)	APPEAL FROM CIRCUIT
PAUL LEWIN and ALPHONSE BOONE, Defendants below.	)	COURT, COOK COUNTY.
PAUL LEWIN, Appellee.	)	321 I.A. 033

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Albert E. Gill, against the defendants, Paul Lewin and Alphonse Boone, to recover damages for malicious prosecution and false arrest and imprisonment. The case was tried before the court and a jury and at the close of plaintiff's evidence the jury was instructed to and did return a verdict of not guilty as to the defendant Alphonse Boone. The jury returned a verdict finding the other defendant Paul Lewin (hereinafter referred to as the defendant) guilty and assessed plaintiff's damages at $300. Defendant's motions for a new trial and in arrest of judgment were denied. His motion for judgment non obstante veredicto was allowed and judgment was entered in favor of defendant notwithstanding the verdict. Plaintiff's appeal seeks the reversal of the judgment notwithstanding the verdict and the remandment of the cause with directions to the trial court to enter judgment on the verdict as to the defendant Paul Lewin and to include in such judgment a special finding that malice was the gist of the action. Defendant filed no brief in this court.

Lewin lived with his wife and two daughters, one 16 years old and the other 7 years old, in an apartment in a thirty-two apartment building located at 1026-30 Hyde Park boulevard. On August 8, 1939, through the window of his home, he saw a man in the vicinity of said building acting

in what he considered a suspicious manner. He left his home to look for a policeman, found Police Officer Boone a few blocks away, and related his suspicions to said officer. According to Lewin he had seen the same man at his back door two or three months previously, at which time the man ran away. Lewin testified in substance that he reported the suspicious conduct of the man to the police officer so that the latter might investigate same; that he did not sign a complaint against Gill and that he did not tell the police officer that he would or wanted to sign a complaint against Gill; and that he appeared as a witness at Gill's trial in the Municipal court in response to Officer Boone's request.

Officer Boone testified that on August 8, 1939 Lewin drove up to where he was standing on duty at 50th street and Ellis avenue and said: "There is a suspicious man over in front of my house *** he was there yesterday, and when I got down to the street he had fan away *** I want that man arrested *** I want to find out who he is;" that "I drove over there and Mr. Lewin had gone around the block and when I pulled up in front of Mr. Gill, Mr. Lewin was across the street in his car, and I said 'Is this the man?' and he said 'yes';" that "I placed him under arrest and took him to the *** Hyde Park Station;" that "I brought him in my car *** and Mr. Lewin followed right behind in his car;" that "I brought Mr. Gill in to the Lieutenant *** he is my superior officer and in all cases like that we have to present them before our superior officer *** Mr. Lewin was in there, too *** he told the Lieutenant that this man had been around his place *** he didn't know who he was or what he wanted *** and he said he wanted that man arrested and didn't want to be bothered with him *** Lieutenant Ball told me to take the man back to the lockup keeper and to turn the prisoner over to him *** he was

informed to take his finger prints and to send the finger prints down to the BI to be checked;" that in the police station Lewin told him and the lieutenant that Gill "was loitering about the rear of the premises of 1030 Hyde Park Boulevard *** he didn't know who he was and he was scared because he had a daughter;" that he understood Lewin to mean that "he was scared of an attack on her;" and that after Gill's finger prints had been checked at the Police Bureau of Identification a report was returned to the Hyde Park Police Station that he had "no record."

Gill testified that he was in the vicinity of defendant's home at the time of his arrest on August 8, 1939 and prior thereto and on other occasions to investigate one Rachel Mintz who lived in the same apartment building in which Lewin lived; that Rachel Mintz was the maker of certain defaulted real estate mortgage bonds and notes which plaintiff owned; that it was his purpose to discover, if possible, any property or assets that she might own and that he had not been guilty of any unlawful conduct at any time when he was in the vicinity of Lewin's home or the apartment building in which he resided.

As already shown, Gill was taken after his arrest to the Hyde Park Police Station where he was finger printed and locked in a cell upon orders of the police lieutenant in charge. Officer Boone signed and swore to a complaint charging Gill with disorderly conduct. He was released on bond after having been incarcerated two or three hours. When the charge against Gill was called for trial in the Municipal court the following morning, August 9, 1939, it was continued and was finally tried on September 19, 1939, when a judgment was entered discharging him.

At the time of his arrest Gill had in his possession a paper that contained some course and vulgar language describing Rachel Mintz, which was typewritten thereon. Officer Boone characterized this language as "immoral" and stated at one point in his testimony that it was because of his possession of "this

informed to take his finger [illegible] down to the DI to be checked; [illegible] told him and the lieutenant [illegible] rear of the premises or [illegible] know who he was and he was [illegible] that he understood [illegible] on her;" and that after [illegible] the Police Bureau of Identification [illegible] Hyde Park Police Station [illegible]."

Gill testified that [illegible] home at the time of his arrest [illegible] and on other occasions to [illegible] in the same apartment building in which Lloyd [illegible] Minta was the owner of certain [illegible] and notes which plaintiff's owner [illegible] cover, if possible, any property [illegible] that he had not been guilty of any [illegible] when he was in the vicinity of [illegible] ing in which he resides.

As already shown, [illegible] Hyde Park Police Station where [illegible] a call upon orders of the [illegible] Officer Boone signed and swore to a [illegible] conduct. He was released [illegible] two or three hours. [illegible] trial in the Municipal Court [illegible] it was continued and was finally taken on [illegible] a judgment was entered dismissing it.

At the time of his arrest [illegible] paper that contained some [illegible] Rachel Minta, which was typewritten [illegible] characterized this language as "[illegible]" [illegible] one point in his testimony that it was because [illegible] for of this

immoral stuff, the immoral things on the paper" that he arrested Gill. When this paper was offered in evidence upon Gill's trial in the Municipal Court it was suppressed on his motion and returned to him. However, this paper or one which purported to be it, was received in evidence without objection on the trial of the instant case. We deem it unnecessary to recite in further detail the evidence concerning this paper or in regard to any other aspect of the case, since the facts set forth are sufficient for our consideration of the only questions necessary to be determined.

The first question presented is whether the trial court erred in entering the judgment in favor of defendant notwithstanding the verdict. It should hardly be necessary to restate the oft repeated rule that in the consideration by the trial court of defendant's motion for judgment in his favor notwithstanding the verdict the evidence in its aspects most favorable to the plaintiff, together with all reasonable inferences arising therefrom, should have been taken most strongly in favor of plaintiff; that the evidence is not weighed and all contradictory evidence or explanatory circumstances must be rejected; that the question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's complaint and that in reviewing the action of the trial court we do not weigh the evidence but can look only to that which is favorable to plaintiff. (Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 Ill. 188; Lloyd v. Rush, 273 Ill. 489; Hunter v. Troup, 315 Ill. 293; Mahan v. Richardson, 284 Ill. App. 493; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104; Wolever v. Curtiss Candy Co., 293 Ill. App. 586; and Rose v. City of Chicago, 317 Ill. App. 1.)

By section 4 of division VI of our Criminal Code (Ill. Rev. Stat. 1939, chap. 38, par. 657) it is provided:

"An arrest may be made by an officer or by a private

person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

In construing the foregoing section of the Criminal Code the Supreme Court has enunciated the rule that before a private citizen can justify an arrest made by him without a warrant, he must show not only that a crime has in fact been committed, but that the person arrested is guilty of the crime and the further rule that an arrest made by an officer caused to be made by a private citizen "is, in principle, precisely the same as if the arrest had been made by a private person." (Enright v. Gibson, 219 Ill. 550.)

Is there any evidence in the record which fairly tends to prove that the defendant Lewin was guilty of false arrest, false imprisonment and malicious prosecution as charged in plaintiff's complaint? It must be held that there is and that the judgment in favor of defendant notwithstanding the verdict was erroneously entered. Gill testified that he was a law abiding citizen and that he was not guilty of breach of peace, disorderly conduct or any other unlawful conduct at or prior to the time of his arrest. Upon his trial in the Municipal court pursuant to Officer Boone's complaint he was discharged. As heretofore shown, Officer Boone testified that when he was first approached on the street by Lewin the latter said, "I want that man [Gill] arrested" and that again in the Police Station the defendant said that "he wanted that man arrested and didn't want to be bothered with him." This evidence in plaintiff's behalf was clearly sufficient to support the verdict as against defendant's motion for a judgment in his favor notwithstanding the verdict. As we have already stated neither contradictory evidence nor explanatory circumstances may be considered in determining a motion of this character. It should be observed that the evidence shows more than a mere complaint by

[illegible]

[illegible] I

[illegible] the [illegible]

private [illegible]

[illegible]

[illegible]

and the [illegible]

to be made by [illegible]

the same [illegible]

(Bumbry v. [illegible])

In there [illegible]

to prove [illegible]

false imprisonment [illegible]

plaintiff's complaint [illegible]

the judge [illegible]

was erroneously [illegible]

solely [illegible]

directly [illegible]

to the time of the [illegible]

court proceeds to [illegible]

[illegible]

first [illegible]

work [illegible]

[illegible]

[illegible]

plaintiff. [illegible]

an [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

observed [illegible]

Lewin to the police officers as to Gill's conduct. It tends to show that he insisted on having Gill arrested.

As heretofore shown, defendant filed no brief in this court. The propriety of the trial court's order denying defendant's motion for a new trial was not presented to us for consideration. Therefore, the question was not presented for determination by this court as to whether the verdict of the jury was manifestly against the weight of the evidence.

The only other point necessary to be considered is plaintiff's contention that in the event the judgment of the trial court is reversed and the cause remanded with directions to enter judgment upon the verdict, there should also be a direction to include in such judgment a special finding that "malice is the gist of the action." At plaintiff's request three interrogatories were submitted to the jury and the same with the answers thereto were returned as follows:

"1. Did the defendant maliciously and without any just cause therefor, cause the plaintiff to be arrested and detained in prison on August 8th, 1939? Answer: Yes.

"2. Is malice the gist of this action? Answer: No.

"3. Did the defendant maliciously and without any just or probable cause therefor, prosecute the plaintiff, or cause him to be prosecuted? Answer: Yes."

It is urged that plaintiff is entitled to have included in the judgment on the verdict a special finding of malice based on the affirmative answers to the first and third interrogatories and that the second interrogatory and the answer thereto should be disregarded because said interrogatory submitted a question of law and the jury did not understand same and must have been confused by it. If there was any confusion or lack of understanding on the part of the jury as to this interrogatory plaintiff alone was responsible for it. It was answered as submitted. That interrogatory, as answered, is repugnant to the other two

Lewin to the police officers [illegible] to show that he insisted on having [illegible].

As hereinbefore shown, [illegible] in the court. The propriety of [illegible] motion for a new trial [illegible] for consideration. Therefore, the question [illegible] for determination [illegible] to [illegible] verdict of the jury was manifestly against the [illegible] the evidence.

The only other point [illegible] in Lehnhoff's contention that in [illegible] the judgment of the trial court is reversed [illegible] to enter judgment upon the verdict, [illegible] direction to infuse in such judgment [illegible] "malice is the gist of the action." [illegible] since interrogatories were [illegible] with the answers thereto [illegible]

"1. Did the [illegible] that came thereafter, cause the [illegible] detained in prison on account [illegible]

"2. Is malice the gist of the [illegible]

"3. Did the defendant [illegible] that came thereafter, [illegible] or probable to be prosecuted? Answer: Yes."

It is urged that Lehnhoff is [illegible] in the judgment on the verdict [illegible] on the affirmative answers to [illegible] and that the second interrogatory [illegible] be disregarded because [illegible] of law and the jury [illegible] sanctioned by it. If there [illegible] standing on the part of the jury [illegible] tiff alone was responsible for it. [illegible] That interrogatory, as [illegible] to the other two

interrogatories as answered by the jury. In our opinion it would be improper and inconsistent to include in the judgment on the verdict a special finding that "malice is the gist of the action" in view of the special finding of the jury that malice was not the gist of the action in response to the second special interrogatory submitted to the jury at plaintiff's request.

For the reasons stated herein the judgment of the Circuit court of Cook county in favor of the defendant notwithstanding the verdict is reversed and the cause is remanded with directions to enter judgment in favor of plaintiff and against the defendant, Paul Lewin, on the verdict of the jury.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

42612

CENTRAL STATES MANUFACTURING & SALES CORPORATION, a corporation,
Appellant,

v.

LINK-BELT COMPANY, a corporation, and ALBERT J. MORAN, Bailiff of the Municipal Court of Chicago,
Appellees.

15

Appeal from Superior Court, Cook County.

A

321 I.A. 634

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by plaintiff, Central States Manufacturing & Sales Corporation, seeks to reverse a decree of the Superior court of Cook county which dismissed this cause for want of jurisdiction and dissolved a temporary injunction theretofore issued.

Link-Belt Company, defendant herein, procured a judgment by confession for $1,315.72 against H. E. Manly, doing business as American Heating and Conditioning Company, in the Municipal court of Chicago. A garnishment proceeding predicated on said judgment was instituted in that court against the plaintiff herein. Upon proper return of service of summonses issued in the garnishment proceeding judgment was entered August 15, 1941 against the garnishee, Central States Manufacturing & Sales Corporation, in the amount of the original judgment of the Municipal court against Manly.

The record discloses that on October 23, 1941 plaintiff herein, the garnishee defendant in the Municipal court, filed its petition in the nature of a bill in equity in said Municipal court to vacate the judgment entered therein against it as garnishee on August 15, 1941, in which petition it challenged the validity of the garnishment summons and the summons on Scire Facias which issued after the conditional judgment in garnishment was entered against it on the ground that there was no proper and legal service of said summonses. An answer to said petition was filed by

the Link-Belt Company, plaintiff in the garnishment proceeding and defendant here, and the cause was set for hearing in the Municipal court on November 26, 1941 on the petition to vacate and the answer thereto. On November 25, 1941, just one day before the petition to vacate was set for hearing in the Municipal court, the defendant garnishee filed its complaint in the Superior court of Cook county seeking the vacation of the Municipal court judgment against it as garnishee. On the same day the original complaint was filed in the Superior court one of the judges thereof entered an order for a temporary injunction without notice and without bond, which injunction restrained the collection of the judgment of the Municipal court. Two days thereafter, on November 27, 1941, the temporary injunction was dissolved, plaintiff's complaint was stricken and it was granted leave to file an amended complaint by order of another judge of the Superior court. A temporary injunction was again issued after the amended complaint was filed. The amended complaint filed in the Superior court alleged the identical grounds for the vacation of the judgment of the Municipal court as were set forth in the petition filed in the latter court to vacate the same judgment. On March 16, 1942 the following order was entered by still another judge of the Superior court:

"On motion of Attorney for Link Belt Co., a corporation to strike the amended complaint for want of jurisdiction of said Court, the Court having jurisdiction of all parties, IT IS HEREBY ORDERED, that motion to strike amended complaint for want of jurisdiction of said court be denied and rule on defendants to answer or plea to said complaint within 10 days, and same be set for further hearing April 17, 1942, 11 A.M., without further notice."

On July 3, 1942 the same Judge, who entered the order of March 16, 1942, entered an order which is in part as follows:

"And the court having heard the testimony of the Honorable GEORGE B. [illegible], that he is the Associate Judge of the Municipal Court of Chicago who on December 23, 1941 [illegible] entered the order of court, a certified copy of which order is on file herein, and that he had been informed by the attorney for the Central States Manufacturing & Sales Corporation, a corporation, at the time said attorney presented and argued said corporation's motion to withdraw from the Municipal Court its petition to

the Tax-Exempt [illegible],
was a [illegible]
Municipal Court [illegible]
and the [illegible],
[illegible]
[illegible],
court, the [illegible]
court of [illegible]
[illegible]
complaint was filed [illegible]
[illegible] an order for [illegible]
without bond, which [illegible]
judgment of the municipal [illegible]
27, 1941, the [illegible]
[illegible]
complaint by [illegible]
[illegible]
was filed. The [illegible]
alleged the [illegible]
of the municipal [illegible]
in the [illegible]
1942 the [illegible]
the [illegible]

[illegible]
to review the [illegible]
Court, the [illegible]
[illegible],
jurisdiction [illegible]
[illegible] or plea [illegible]
for further [illegible]
notice."

On July 3, 1942 [illegible]

1942, [illegible]

[illegible]
Municipal Court of [illegible]
the order of [illegible]
[illegible], and that [illegible]
Central [illegible]
at the time [illegible]
motion to [illegible]

vacate the judgments entered against it therein in favor of Link-Belt Company, a corporation, that said Central States Manufacturing & Sales Corporation, a corporation, has filed the instant case in this Superior Court of Cook County, in Equity and that the order entered by him granting leave to said Central States Manufacturing & Sales Corporation, a corporation, to withdraw its said petition to vacate judgment was entered over the objection of the attorneys for the said Link-Belt Company, a corporation, and that the motion of said Link-Belt Company, a corporation, to court his legal finding and to vacate said order is still pending before him:

IT IS HEREBY ORDERED that defendant's said motion to vacate and set aside the order entered herein on March 16, 1942 overruling said defendant's motion to strike plaintiff's amended counter claim and to dissolve the temporary injunction be and the same is hereby overruled."

This appeal is prosecuted from the following order entered by Judge Graber on November 24, 1942:

"This matter having been argued in open court by counsel for the respective parties on motion of Link-Belt Company, a corporation, to strike plaintiff's amended complaint for want of jurisdiction and to dissolve the temporary injunction heretofore entered, and the court having taken the matter under advisement and now being fully advised in the premises:

"The court finds that plaintiff filed the instant case herein while its petition to vacate judgment on grounds of no service of summons was pending in the Municipal Court of Chicago and that therefore said Municipal Court of Chicago had exclusive jurisdiction over the parties and the subject matter of this cause.

"IT IS THEREFORE ORDERED that defendant's motion to vacate the order heretofore entered herein on July 3, 1942 be and the same is hereby sustained and the temporary injunction heretofore entered herein is hereby dissolved and the above cause is hereby dismissed for want of jurisdiction."

Did the Superior court have jurisdiction to try the issue presented by plaintiff's amended complaint filed therein?

Section 21 of the Municipal Court Act (par. 376, sec. 21, chap. 37, Ill. Rev. Stat. 1941), provides in part as follows:

"If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity ***."

It will be noted that included in the methods of

procedure by which a judgment of the Municipal court may be vacated after the expiration of 30 days from the date of its entry are the filing of a bill in equity or the filing of a petition in the Municipal court in the nature of a bill in equity. Both the Superior court and the Municipal court had jurisdiction under the foregoing section of the Municipal Court Act to consider and determine any equitable right of the plaintiff herein to have the garnishment judgment vacated. The tribunal selected by the garnishee was the Municipal court and it filed its petition in the nature of a bill in equity therein to vacate said garnishment judgment. Under the law plaintiff was precluded from seeking the same relief in the Superior court by a complaint in equity on the identical grounds asserted in its petition to the Municipal court. When the complaint was filed in the Superior court the petition to vacate was still pending and undisposed of in the Municipal court. Where two courts have concurrent jurisdiction, a party has the right to select either court for the prosecution of his rights and when his selection is made it is binding upon him. The court in which he brings his action has exclusive jurisdiction of the particular case. (The People v. Hess, 351 Ill. 68; Ill. Life Ins. Co. v. Prentiss, 277 Ill. 383; Royal League v. Kavanagh, 233 Ill. 175.)

In the Kavanagh case the court said at pp. 183-184:

"A person has the right to select such tribunal having jurisdiction as he chooses for the prosecution of his rights, and the court which first obtains jurisdiction will retain it. Such jurisdiction cannot be defeated because the defendant may prefer another tribunal in which he supposes the decision will be more favorable to him."

It is urged that the defendant herein submitted itself to the jurisdiction of the Superior court by its appearance in the various proceedings had in that court before the several judges thereof who entered the orders heretofore referred to prior to the entry of final order by Judge Graber, dismissing

the cause for want of jurisdiction, and that Judge Graber had no authority to review the prior orders of the other judges of the Superior court. The record discloses that defendant questioned the jurisdiction of the Superior court since the inception of this proceeding in said court and persisted in so questioning the jurisdiction of that court until the entry of the order appealed from. We think that, even though defendant had not promptly and properly raised the question of the court's jurisdiction, the right is inherent in every court to vacate and set aside its own orders and decrees that are void upon their face and courts will not allow a void order to stand when to do so would be inconsistent with substantial justice. In any event, where a court is without jurisdiction under the law to try an issue, jurisdiction cannot be conferred by the acts or even the agreement of the parties. (Martins v. Bankers Life Ins. Co., 358 Ill. 388.)

As heretofore shown the petition to vacate was filed in the Municipal court on October 23, 1941 and the complaint seeking to vacate the same Municipal court judgment was filed in the Superior court on November 25, 1941. The order of July 3, 1942 of the Superior court was the only order vacated by Judge Graber and it shows that the garnishee defendant's petition to vacate was still pending in the Municipal court when ~~said order of July 3, 1942 was entered in the Superior court~~. Therefore such order was void in that it showed on its face that the Municipal court had exclusive jurisdiction to hear and decide this case.

In our opinion the order of the Superior court dismissing this cause was properly entered and should be affirmed.

ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

the complaint was filed in the Superior Court to vacate the same judgment

42631

16 335

LILLIAN ESCHNER,
Appellee,

v.

PEOPLES RADIO STORES, INC.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

221 I.A. 634

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Lillian Eschner, confessed judgment on a lease for $526.40 against defendant, Peoples Radio Stores, Inc., which amount included rent due under said lease for September and October, 1942, and attorney's fees, said rent having accrued after defendant's removal from the demised premises. An order was entered by the trial court denying defendant's motion to open the judgment and for leave to defend. Defendant appeals from this order.

A large portion of plaintiff's brief is devoted to argument that defendant's motion to open the judgment and the affidavit filed in support thereof were insufficient in form, that said motion was not filed within apt time and that defendant was not diligent in filing same. The record discloses that not one of these questions was raised by appropriate objection in the trial court and plaintiff is precluded from presenting them here for the first time.

The only question presented for our consideration and determination is whether the trial court erred in holding by its order denying the motion to open the judgment and for leave to defend that defendant's verified petition did not state a *prima facie* defense. Defendant insists that it did. Plaintiff just as strongly asserts that it did not.

Defendant's verified second amended petition to open the judgment averred *inter alia*:

"3. Your petitioner avers that it has a good and valid defense to said judgment and to any indebtedness alleged to be due under the said lease; as grounds for said defense Petitioner states the following facts:

"(a) At the time of the execution of this lease the Plaintiff agreed as consideration for your Petitioners entering into this lease, to repair the roof and floors of the premises covered by the lease and further to put said premises in a tenantable condition in accordance with the needs of your Petitioner's business.

"(b) Since the execution of this lease, the Plaintiff assumed and undertook to make the repairs and did in fact attempt to make repairs to the roof of the premises; but did in fact make feeble, negligent and insufficient repairs with the result that all her efforts were not sufficient to keep the rain from coming through the roof of the said building and unto the premises of your Petitioner causing the floors to become warped and irregular and insufficient in that damage was caused to the goods and merchandise of this Defendant which were stored on the premises in accordance with the purposes for which this lease was entered into.

"(c) That the defendant has made numerous and repeated requests of the Plaintiff both in writing and orally to repair the roof and the floor so that your Petitioner might fully enjoy the use of the premises leased.

"(d) That the building consists of two floors but that your Petitioner leased the first floor only and it had no access to the roof; on the contrary, the roof was under the exclusive control of the Plaintiff herein and she was therefore bound to make the necessary repairs towards the end of repairing the roof and permitting your Petitioner to enjoy the use of the premises.

[illegible] Your [illegible]

[illegible] offense to said [illegible]

[illegible] and [illegible]

[illegible] the following [illegible]

"(a) [illegible]

[illegible] apparently [illegible]

into this [illegible]

covered by the [illegible]

able condition in [illegible]

business.

"(b) [illegible]

assessed and [illegible]

to made repairs to the [illegible]

feable, negligent [illegible]

all her efforts [illegible]

shown in the roof [illegible]

your petitioner's [illegible]

and insufficient in [illegible]

examine of this [illegible]

accordance with the [illegible]

into.

"(c) [illegible]

requests of the [illegible]

the roof and the [illegible]

the use of the [illegible]

"(d) [illegible]

your petitioner [illegible]

to the roof; on [illegible]

control of the [illegible]

make the necessary [illegible]

roof and permitting your [illegible]

premises.

"Your petitioner further states that on August 18, 1941 he wrote to the Plaintiff asking her to make the necessary repairs to the roof pursuant to her original undertaking to do so and also pursuant to the numerous promises made by her to repair the same. The Plaintiff pursuant to these demands of your Petitioner sent her agents to the premises who proceeded to patch the roof. During the next rain, this patch was of no avail and the rain continued to come through the roof and damage the stock and merchandise of the Defendant. Again on October 27, 1941, Defendant wrote to the Plaintiff advising her of the defective conditions of the roof and the floor and asked that proper repairs be made. The Plaintiff again sent her agents and attempted to repair the roof but again the repairs were so feeble, negligent and insufficient as not to keep out the rains from coming unto the premises of the Petitioner, which constant rains warped the floors, in turn causing the merchandise of your Petitioner to slide, roll and fall upon other merchandise thus damaging the same and causing rain-water damage upon them as well. Plaintiff again on June 3, 1942 attempted to fix this roof but with no better results than on previous occasions. Again on June 3, 1942 the Defendant wrote the Plaintiff of additional damage caused to the Petitioner's property through rain falling on the radios and electrical supplies of your Petitioner. Pursuant to this request, numerous promises were made by the Plaintiff to remedy the faulty conditions existing in the roof and floors but no more substantial repairs or improvements were made and during the following rains, rain water seeped through the ceiling, fell upon the floors and merchandise of your Petitioner, warping the floors and causing its radios and other articles maintained on the premises for sale pursuant to your Petitioner's course of business, all to your Petitioner's great damage and loss. Further, the rain so seeping through, fell upon the radios and electrical devises of this Petitioner causing great damage to

[illegible]
he wrote to the [illegible]
paths to the [illegible]
and I do [illegible]
the same. The [illegible]
floors and [illegible]
roof. Making [illegible]
rain continued [illegible]
room-office of the [illegible]
and wrote to the [illegible]
tions of the [illegible]
be made. The [illegible]
repair the roof but [illegible]
and heavy [illegible]
the premises of the [illegible]
floors, in turn [illegible]
slide, roll and [illegible]
same and causing [illegible]
left again on June 2, [illegible]
no better results than on [illegible]
1942 the defendant wrote the [illegible]
caused to the [illegible]
the radios and [illegible]
to this report, [illegible]
remedy the family conditions [illegible]
but no more substantial [illegible]
during the following [illegible]
fell upon the floors and [illegible]
the floors and [illegible]
on the premises for a [illegible]
of business, all to your [illegible]
further, the rain so [illegible]
electrical devices of the [illegible]

the same and necessitating expensive repairs and in some instances, preventing their use whatsoever.

"Your Petitioner further states that because of Plaintiff's original undertaking to repair the roof and floor and her subsequent failure to make those necessary repairs, but making them only feebly, negligently and insufficiently, your Petitioner was caused a great deal of damage and it became impossible to do business on the premises leased; under those circumstances, your Petitioner was compelled to vacate the premises and did so vacate the premises on August 17, 1942."

It is urged that the alleged oral promise of plaintiff to repair the roof of the premises involved herein made prior to or contemporaneously with the execution of the lease could not possibly furnish the basis for the defense of constructive eviction. We agree with plaintiff's contention in this regard. We also agree with plaintiff that, where there was no contractual obligation otherwise to make the repairs in question, a contract to make such repairs cannot be created by or inferred from a voluntary or gratuitous attempt alleged to have been made by the lessor to repair the roof. Therefore the allegations of defendant's petition to open the judgment in respect to the foregoing matters must be disregarded, since they furnish no basis for the defense of constructive eviction.

However, plaintiff's counsel in her brief recognizes that it is the established law of this state that, where a portion less than the whole of a building is demised and the landlord retains under his control certain other portions of the building, the landlord's failure to keep those portions under his control in sufficient repair so as to permit the tenant to occupy the demised portion of the building for the purpose of the tenancy, will constitute a constructive eviction. (Payne v. Irvin, 144 Ill. 482; Johns v. Eichelberger, 109 Ill. App. 35; Lawler v. McNamara, 203 Ill. App. 285; Lakeview Ave.

the same and necessarily [illegible]
estates, preventing their [illegible].

"Your petitioner [illegible]
title's original [illegible]
subsequent failure [illegible]
them only [illegible]
or was caused [illegible]
to business on the premises [illegible]
your petitioner was compelled [illegible]
vacate the premises on [illegible].

It is urged that the [illegible]
to repair the roof of the premises [illegible]
or contemporaneously with the [illegible]
possibly [illegible]
eviction. [illegible]
We also agree with [illegible]
obligation [illegible]
to make such repairs [illegible]
voluntary or [illegible]
the lessor to repair the roof. [illegible]
defendant's petition [illegible]
foregoing [illegible]
basis for the [illegible].

However, [illegible]
that it is the [illegible]
portion less than [illegible]
landlord retains [illegible]
the building, the [illegible]
under his control [illegible]
tenant to occupy the [illegible]
purpose of the [illegible]
(Payne v. Irwin, [illegible]
App. 39; Lawler v. [illegible]

Bldg. Corp. v. McFarland, 265 Ill. App. 517.)

In the light of the foregoing rule of law we will now consider paragraph 3 (d) of defendant's petition which is as follows:

"(d) That the building consists of two floors but that your Petitioner leased the first floor only and it had no access to the roof; on the contrary, the roof was under the exclusive control of the Plaintiff herein and she was therefore bound to make the necessary repairs towards the end of repairing the roof and permitting your Petitioner to enjoy the use of the premises."

Plaintiff's counsel indulges in rather captious criticism of the allegations contained in this paragraph but he does not even pretend to claim that such allegations do not state a sound basis for the defense of constructive eviction. He particularly criticises the allegation that the roof was under the exclusive control of the lessor as being a conclusion of law. The absurdity of this criticism is manifest when it is considered that it was upon the lease, evidencing the control of the building, including, of course, its roof, by the landlord lessor, that the confession of judgment was obtained.

While, as heretofore shown, the petition to open the judgment contained certain allegations that purported to state a basis for the defense of constructive eviction that were wholly insufficient for that purpose and while said petition was prolix, loosely drawn and replete with allegations of evidenciary facts, still, when considered as a whole, we think it stated a good defense of constructive eviction. It alleged the legal duty of the lessor to repair the roof, her failure to perform that duty, the continuing damage to defendant's property on the leased premises, the fact that the premises became unfit for the purpose of the tenancy and the further

Judge [illegible]

In the light of [illegible]
conclusion [illegible]
follows:

"(d) [illegible]
that your [illegible]
access to the [illegible]
exclusive control of the [illegible]
Core court [illegible]
exploiting the [illegible]
use of the [illegible]

[illegible]
application of the [illegible]
he does not even [illegible]
state [illegible]
He particularly [illegible]
under the exclusive [illegible]
clusion of [illegible]
when it is [illegible]
the control of [illegible]
by the Langlois [illegible]
obtained.

[illegible]
judgment [illegible]
a basis [illegible]
World [illegible]
see profit, [illegible]
[illegible]
it seems [illegible]
the [illegible]
to perform [illegible]
property in [illegible]
because [illegible]

fact that defendant was compelled to move from said premises by reason of plaintiff's failure to repair the roof. Pleadings in fourth class cases in the Municipal court are not subject to strict rules of construction. It is only necessary that they state a cause of action or defense in understandable language and with sufficient particularity.

While we have heretofore stated that voluntary repairs made by a landlord raised no presumption of a contract to repair, we do not wish to be understood as intimating that repairs or attempts to repair may not be shown in evidence upon the trial of this cause.

Inasmuch as the petition herein to open the judgment stated a prima facie defense of constructive eviction, the trial court erred in denying defendant's motion to open the judgment and for leave to defend.

The order of the Municipal court of Chicago denying said motion is reversed and the cause is remanded with directions to allow said motion and that such further proceedings be had as are not inconsistent with the views herein expressed.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

42709

FIRST UNITED FINANCE CORPORATION,
a corporation,
Appellee,

v.

JOSEPH VANEK, FRANK VANEK and
JAMES VANEK, doing business as
Vanek Bros. Motor Service, et al.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

3211 I.A. 635

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action in trover brought in the Municipal Court of Chicago by plaintiff, First United Finance Corporation, against defendants Joseph Vanek, Frank Vanek and James Vanek, doing business as Vanek Bros. Motor Service. The case was tried before the court and a jury and the court instructed the jury that a certain judgment or decree of the Superior court of Cook county, which was offered and received in evidence, was binding on defendants and decisive of the title to the personal property involved herein and that the only question necessary to be submitted to the jury for its consideration was the amount of damages that plaintiff was entitled to recover. The jury returned the only form of verdict submitted to it, which found defendants guilty of conversion and assessed plaintiff's damages at $1,100. Judgment was entered on the verdict. Defendants appeal.

Upon the trial defendants were not permitted to offer any evidence except as to the value of the property in question. The material facts necessary to be considered appear from plaintiff's evidence and an offer of proof made by defendants.

February 18, 1941 Russell Baker, as mortgagee, foreclosed his chattel mortgage on the motor truck involved herein and at the foreclosure sale he purchased the truck in the name of his nominee, Chicago & Illinois Valley Transporation Company. (The purchaser at the foreclosure sale will sometimes hereinafter for convenience be referred to as Baker.) On the same

FIRST UNITED FINANCE CORPORATION, a corporation, Appellee, v. JOSEPH VANEK, FRANK VANEK and JAMES VANEK, doing business as Vanek Bros. Motor Service, et al., Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

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Upon the trial defendants were not permitted to offer any evidence except as to the value of the property in question. The material facts necessary to be considered appear from plaintiff's evidence and an offer of proof made by defendants.

February 15, 1941 Russell Baker, as mortgagee, foreclosed his chattel mortgage on the motor truck involved herein and at the foreclosure sale he purchased the truck in the name of his nominee, Chicago & Illinois Valley Transportation Company. (The purchaser at the foreclosure sale will sometimes hereinafter for convenience be referred to as Baker.) On the same

day Baker removed it from the premises of the mortgagor. Thereafter he sold the truck to the defendants for $300 and delivered it to them. When Baker took possession of the truck from the mortgagor, it was on the latter's premises and stored in one of said mortgagor's sheds. In consummation of the foreclosure sale Baker received a certificate of title from the Secretary of State and indorsed same to defendants who purchased the truck from him. After the sale to defendants was consummated and the truck delivered to them, Baker learned that plaintiff claimed title to the same truck by a previous foreclosure had on December 5, 1940. Subsequently a suit was started in the Superior court of Cook county by Baker to determine title to other chattels not involved in this case and the plaintiff herein intervened in that suit to have title determined as to the truck in question. The Superior court entered a decree in which it was found that the title to said truck was in the intervenor in that proceeding, who, as already stated, is the plaintiff here. April 30, 1942, plaintiff made a demand on defendants for the truck, which was refused, and thereafter the instant action was instituted. As heretofore stated, the trial judge refused to admit any evidence offered by defendants as to their right to the title to the truck and instructed the jury to find them guilty of conversion and to assess as plaintiff's damages the value of the truck as of April 30, 1942.

Defendants' theory as stated in their brief is that: "(1) they were innocent purchasers for value before the Superior Court suit was instituted, and they were not parties to that suit and had no knowledge of the same, and have had no opportunity to defend their title either in the Superior Court suit or in this suit; (2) whatever lien plaintiff had on the truck because of the foreclosure of its chattel mortgage, became void and a fraud per se as to third parties,

day Baker removed it from the premises of the mortgagor. Thereafter he sold the truck to the defendants for $300 and delivered it to them. When Baker took possession of the truck from the mortgagor, it was on the latter's premises and stored in one of said mortgagor's sheds. In consummation of the foreclosure sale Baker received a certificate of title from the Secretary of State and informed same to defendants who purchased the truck from him. After the sale to defendants was consummated and the truck delivered to them, Baker learned that plaintiff claimed title to the same truck by a previous foreclosure had on December 1, 1940. Consequently a suit was started in the Superior court of Cook county by Baker to determine title to other chattels not involved in this case and the plaintiff herein intervened in that suit to have title determined as to the truck in question. The superior court entered a decree in which it was found that the title to said truck was in the intervenor in that proceeding, who, as already stated, is the plaintiff here. April 30, 1942, plaintiff made a demand on defendants for the truck, which was refused, and thereafter the instant action was instituted. As heretofore stated, the trial judge refused to admit any evidence offered by defendants as to their right to the title to the truck and instructed the jury to find them guilty of conversion and to assess as plaintiff's damages the value of the truck as of April 30, 1942.

Defendants' theory as stated in their brief is that:

"(1) they were innocent purchasers for value before the Superior Court suit was instituted, and they were not parties to that suit and had no knowledge of the same, and have had no opportunity to defend their title either in the Superior Court suit or in this suit; (2) whatever lien plaintiff had on the truck because of the foreclosure of its chattel mortgage, became void and a fraud per se as to third parties,

because it failed to take possession of the truck after the foreclosure; (3) that the question of the title to the truck should have been litigated as an issue in this case."

Upon the trial the theory of plaintiff and the trial judge seems to have been that the title to the truck was adjudicated in the Superior court of Cook county and that this adjudication was binding upon the defendants herein, although they were not parties to the proceeding in the Superior court and had no knowledge of same, because said defendants purchased the truck from the Chicago & Illinois Valley Transportation Company, which was a party to the Superior court suit.

Defendants contend that "the issue of the title to the truck should have been presented to the jury" and that "defendants' title to the truck is superior to the claim of the plaintiff."

Plaintiff advances the following propositions in support of the judgment:

"The vendee of personal property, though an innocent purchaser thereof, obtains no more perfect title to the property purchased than the vendor himself possessed, as the vendee can acquire no better title to the property than his vendor had.

"A decree in another suit is admissible in evidence, to prove title to personal property, character of possession, or as a part of a chain of title, for or against strangers to the other suit as well as for or against the parties to the original suit.

"Plaintiff's title to the truck in question has never been divested and is superior to the claims of the defendants."

As has been noted, the decree of the Superior court, which was received in evidence, determined that as between Chicago & Illinois Valley Transportation Company and the plaintiff herein, the title to the truck was in plaintiff but defendants say that they as innocent purchasers bought

because it failed to take possession of the truck after the foreclosure; (3) that the question of the title to the truck should have been litigated as an issue in this case."

Upon the trial the theory of plaintiff and the trial judge seems to have been that the title to the truck was adjudicated in the superior court of Cook county and that this adjudication was binding upon the defendants herein, although they were not parties to the proceeding in the superior court and had no knowledge of same, because said defendants purchased the truck from the Chicago & Illinois Valley Transportation Company, which was a party to the superior court suit.

Defendants contend that "the issue of the title to the truck should have been presented to the jury" and that "defendants' title to the truck is superior to the claim of the plaintiff."

Plaintiff advances the following propositions in support of the judgment:

"The vendee of personal property, through an innocent purchaser thereof, obtains no more perfect title to the property purchased than the vendor himself possessed, as the vendee can acquire no better title to the property than his vendor had.

"A decree in another suit is admissible in evidence, to prove title to personal property, character of possession, or as a part of a chain of title, for or against strangers to the other suit as well as for or against the parties to the original suit.

"Plaintiff's title to the truck in question has never been divested and is superior to the claims of the defendants."

As has been noted, the decree of the superior court, which was received in evidence, determined that as between Chicago & Illinois Valley Transportation Company and the plaintiff herein, the title to the truck was in plaintiff but defendants say that they as innocent purchasers bought

the truck from Chicago & Illinois Valley Transportation Company prior to the institution of the proceeding in the Superior court that resulted in said decree, that they were neither parties nor privies to any party in that proceeding, that they had no knowledge of the institution or pendency of said proceeding and that they were not and could not be bound by the decree entered therein. Their position in this regard seems to be well taken.

"A purchaser is concluded by the judgment rendered in an action by or against his vendor concerning the ownership of the property provided he acquired his interest during the pendency of the suit or after the rendition of the judgment therein. This rule, however, does not apply where he took title before the suit was begun." (34 Corpus Juris, 1016, par. 1440.)

Plaintiff recedes from the position taken by it in the trial court that the Superior court's decree was binding *per se* upon defendants as a determination of the title to the truck as between them and it, because now it merely asserts that "a decree in another suit *is admissible in evidence*" as tending to establish "title to personal property, character of possession or a link in a chain of title, for or against strangers to the original suit." The decree of the Superior court was admissible in evidence for the purposes above indicated, according to the authorities cited by plaintiff, (*Gage v. Goudy*, 141 Ill. 215; Freeman on Judgments, vol. 2, sec. 1040, pp. 2169-2171), but defendants were not concluded by it, as the trial court held. In *Gage v. Goudy, supra*, cited by plaintiff, the court said at p. 220:

"The contention that said decree was incompetent and inadmissible as against the defendant can not be sustained. It is true, in general, that judgments and decrees are evidence only in suits between the parties thereto and their privies, but that rule is inapplicable

the truck from Chicago & Illinois Valley Transportation Company prior to the institution of the proceeding in the superior court that resulted in said decree, that they were neither parties nor privies to any party in that proceeding, that they had no knowledge of the institution or pendency of said proceeding and that they were not and could not be bound by the decree entered therein. Their position in this regard seems to be well taken.

"A purchaser is concluded by the judgment rendered in an action by or against his vendor concerning the ownership of the property provided he acquired his interest during the pendency of the suit or after the rendition of the judgment therein. This rule, however, does not apply where he took title before the suit was begun. (34 Corpus Juris, 1016, par. 1440.)

Plaintiff receives from the position taken by it in the trial court that the superior court's decree was binding *per se* upon defendants as a determination of the title to the truck as between them and it, because now it merely asserts that "a decree in another suit is admissible in evidence" as tending to establish "title to personal property, character of possession or a link in a chain of title, for or against strangers to the original suit." The decree of the superior court was admissible in evidence for the purposes above indicated, according to the authorities cited by plaintiff, (Gage v. Gourdy, 141 Ill. 313; Freeman on Judgments, vol. 2, sec. 1040, pp. 2169-2171), but defendants were not concluded by it, as the trial court held. In Gage v. Gourdy, *supra*, cited by plaintiff, the court said at p. 320:

> "The contention that said decree was incompetent and inadmissible as against the defendant can not be sustained. It is true, in general, that judgments and decrees are evidence only in suits between the parties thereto and their privies, but that rule is inapplicable

in a case like this, where the decree is not introduced as per se binding upon any rights of the defendant, but as tending to establish a link in the chain of the complainant's title."

Upon a retrial of this case the decree of the Superior court should be received in evidence, if offered, but only as tending to establish plaintiff's title to the truck or a link in its chain of title to same.

Defendants concede that a vendee of personal property, though an innocent purchaser thereof, obtains no better title to the property than the vendor himself possesses but contend that said rule is not applicable to any issue presented by the pleadings in this case. There is no issue in this case to which the foregoing rule is applicable.

Plaintiff asserts that its "title to the truck in question has never been divested." Defendants insist that plaintiff has been divested of title to the truck by reason of its failure to remove said truck from the mortgagor's possession within a reasonable time after title became vested in it as a result of the foreclosure sale under its then prior chattel mortgage. Defendants further insist that, since plaintiff permitted the truck to remain on the mortgagor's premises and in the mortgagor's possession for 73 days after said plaintiff purchased it at the sale made pursuant to the foreclosure of its own chattel mortgage or until Baker foreclosed his chattel mortgage against the truck and immediately removed same from the possession of said mortgagor, plaintiff's conduct in so permitting the truck to remain in the possession of the mortgagor constituted a fraud per se as to defendants who thereafter bought the truck as innocent purchasers for value, and that the lien of plaintiff's mortgage and the foreclosure and sale made thereunder became void in so far as defendants' interest in and title to the truck were concerned.

Instead of answering these contentions of defendants

in a case like this, where the source is not determined as per se binding upon any rights of the defendant, but as tending to establish a link in the chain of the complainant's title."

Upon a retrial of this case the decree of the Superior court should be received in evidence, if offered, but only as tending to establish plaintiff's title by the breach or a link in its chain of title to same.

Defendants concede that a venue of personal property, though an innocent purchaser thereof, obtains no better title to the property than the vendor himself possesses, but contend that said rule is not applicable to any issues presented by the pleadings in this case. There is no issue in this case to which the foregoing rule is applicable.

Plaintiff asserts that its title to the truck in question has never been divested. Defendants insist that plaintiff has been divested of title to the truck by reason of its failure to remove said truck from the mortgagor's possession within a reasonable time after title became vested in it as a result of the foreclosure sale under its then prior chattel mortgage. Defendants further insist that, since plaintiff permitted the truck to remain in the mortgagor's possession and in the mortgagor's possession for [illegible] after said plaintiff purchased it at the [illegible] sale to the foreclosure of its own chattel mortgage of which [illegible] foreclosed his chattel mortgage against the truck [illegible] same from the possession of said mortgagor, plaintiff [illegible] in so permitting the truck to remain in the possession of the mortgagor constituted a fraud per se [illegible] thereafter bought the truck in [illegible] and that the lien of plaintiff [illegible] and sale made thereunder became void in so far as defendants' interest in and title to the truck are concerned.

Instead of answering the [illegible] of defendants

in its brief, plaintiff goes off on a tangent and cites present and previous sections of the Chattel Mortgage Act relating to the period during which a chattel mortgage remains a good and valid lien and discusses matters concerning which there is no evidence in the record.

There is no question here concerning the validity of plaintiff's mortgage. That the lien under the plaintiff's mortgage was valid and superior is admitted. The legality and propriety of the foreclosure of said lien and the purchase of the truck by plaintiff at the foreclosure sale are conceded. The real question presented is whether plaintiff's mortgage became void and its lien thereunder extinguished as to Baker, the junior mortgagee, and defendants who were subsequent innocent purchasers from him, because of said plaintiff's failure to take possession of the truck from the mortgagor within a reasonable time after default, foreclosure and sale.

It has been repeatedly held that possession of mortgaged chattels must be taken by the mortgagee within a reasonable time after foreclosure and sale because of default in payment or other condition broken and that failure by the mortgagee to take possession constitutes a fraud per se as to third persons which is not subject to explanation and that such failure to take possession within a reasonable time renders the mortgage void in so far as the interests and liens of third persons are affected. (Shannon v. Wolf, 173 Ill. 253; Atkins v. Byrnes, 71 Ill. 326; Burham v. Muller, 61 Ill. 453; Albert Pick & Co. v. Spoor, 212 Ill. App. 612.) In Reed v. Ames, 19 Ill. 594, the court said at p. 596:

"Suffering property to remain in the hands of the vendor or mortgagor, after default, is a fraud, because the real ownership being in one person, and the ostensible ownership in another, gives the latter a false credit. Some Courts have held that such facts are open to explanation ***. We think the better rule is - the safest and founded in the best policy - to hold that such facts

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There is no question here concerning the validity of plaintiff's mortgage. That the lien under the plaintiff's mortgage was valid and superior is admitted. The legality and propriety of the foreclosure of said lien and the purchase of the truck by plaintiff at the foreclosure sale are conceded. The real question presented is whether plaintiff's mortgage became void and its lien thereunder subordinated to Baker, the junior mortgagee, and defendants who were subsequent innocent purchasers from him, because of said plaintiff's failure to take possession of the truck from the mortgagor within a reasonable time after default, foreclosure and sale.

It has been repeatedly held that possession of mortgaged chattels must be taken by the mortgagee within a reasonable time after foreclosure and sale because of default in payment or other condition broken and that failure by the mortgagee to take possession constitutes a fraud per se as to third persons which is not subject to explanation and that such failure to take possession within a reasonable time renders the mortgage void in so far as the interests and liens of third persons are affected. (Harrison v. Gill, 173 Ill. 253; Atkins v. Graves, 71 Ill. 369; Mathews v. Miller, 61 Ill. 472; Albert Pick Co. v. Lyons, 1 Ill. App. 612.) In Bean v. Ames, 1 Ill. App. 596, the court said at p. 596:

"Suffering property to remain in the hands of the vendor or mortgagor, after default, is a fraud, because the real ownership being in one person, and the ostensible ownership in another, gives the latter a false credit. Some Courts have held that such facts are open to explanation ***. We think the better rule is - the safest and founded in the best policy - to hold that such facts

constitute fraud per se, and not to be explained."

Mere constructive possession is not sufficient to preserve the lien of a mortgagee after foreclosure but it must be such possession as to indicate to the world that the mortgagee has acquired ownership of the property. (Williams v. Head, 219 Ill. App. 5, and cases cited therein.) In the instant case the truck was permitted to remain in one of the mortgagor's buildings on the latter's premises and there was nothing about the truck that would indicate to a creditor or third persons that it was in the possession or control of plaintiff. What constitutes a reasonable time within which a mortgagee must take possession depends on the special circumstances of each case. In Richley v. Childs, 114 Ill. App. 173, it was held that the failure of the mortgagee to take possession of a truck, team of horses and harness within three days after default was unreasonable.

If plaintiff failed to take possession of the truck within a reasonable time after default under its mortgage and the foreclosure thereof, it would seem to follow that Baker's junior mortgage became a senior lien. If Baker's foreclosure of his mortgage and his immediate removal of the truck from the mortgagor's premises gave him a good title to such truck against the world, it would seem that by his sale of the truck to defendants, who were innocent purchasers for value, they acquired title to the truck superior to the claimed title of plaintiff.

For the reasons heretofore shown and, notwithstanding that the decree of the Superior court found that as between plaintiff and Baker the title to the truck was in plaintiff, defendants are entitled to have the issue as to the title to the truck determined as between them and plaintiff.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND REMANDED.

Friend, P. J., and Scanlan, J., concur.

constitute fraud *per se*, and not to be explained."

Mere constructive possession is not sufficient to preserve the lien of a mortgage after foreclosure. It must be such possession as to indicate to the world that the mortgagee has acquired ownership of the property. (*Williams v. Head*, 43 Ill. App. 5, and cases cited therein.) In the instant case the truck was permitted to remain in one of the mortgagor's buildings on the latter's premises and there was nothing about the truck that would indicate to a creditor or third persons that it was in the possession or control of plaintiff. What constitutes a reasonable time within which a mortgagee must take possession depends on the special circumstances of each case. In *Richley v. Childs*, 114 Ill. App. 173, it was held that the failure of the mortgagee to take possession of a team of horses and harness within three days after default was unreasonable.

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For the reasons hereinbefore shown and, notwithstanding that the decree of the superior court found that as between plaintiff and Baker the title to the truck was in plaintiff, defendants are entitled to have the issue as to the title to the truck determined as between them and plaintiff.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McGOORAH, P.J., and SCANLAN, J., concur.

42725

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOSEPH G. HEBERT,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

321 I.A. 635

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, Joseph G. Hebert, seeks to reverse a judgment of the Municipal court of Chicago, whereby he was adjudged guilty of "unlawfully having in his possession, lewd and obscene books and pictures" and sentenced to six months imprisonment in the Cook County Jail. Jury trial was waived by defendant.

This prosecution was based upon an information which charged defendant with a violation of par. 468, chap. 38, Illinois Revised Statutes, 1941, in the following language: "That the Defendant did then and there, unlawfully, wilfully, wickedly, maliciously, and scandalously have in his possession certain lewd books and immoral literature and object to the Manifest Corruption of Public Morals in contempt of the People and the law to the evil example of all persons."

On October 1, 1942, two police officers went to defendant's home at 436 South Oakley Boulevard, Chicago, where he lived with his wife, and with defendant's consent made a search of the premises but found nothing incriminating therein. The officers then left but returned a short time later and took defendant with them to a store at 407 South Oakley Boulevard, operated by one Cozzi. People's Exhibits 4, 5, 6 and 7, which it was stipulated upon the trial were obscene pictures and literature, were exhibited to defendant in Cozzi's store and Cozzi stated in Hebert's presence that Hebert owned an interest in said

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

By this writ of error [illegible] seeks to reverse a judgment of the criminal court of Cook County, whereby he was convicted of "willfully burning in his possession, land and obscene books and pictures" and sentenced to six months imprisonment in the Cook County Jail. Jury trial was waived by stipulation.

This proceedings [illegible] which charged defendant with violation of [illegible] chap. 38, Illinois Revised Statutes 1943, in the following language: "Did the defendant [illegible] these, unlawfully, willfully, knowingly, deliberately, and scandalously have in his possession and in land books and [illegible] literature and objected to the [illegible] Corporation of Public [illegible] in violation of the people and the law to the evil [illegible] of Illinois."

On October 1, 1944, two officers of [illegible] to defendant's home at [illegible] where he lived with his wife, and [illegible] made a search of the premises but found nothing [illegible] nothing therein. The officers [illegible] about the lewd books [illegible] at 407 North Dearborn, delivered, [illegible] People's Exhibits [illegible] upon the trial were obscene, lecherous and lewd books, were exhibited to defendant in Cook [illegible] in Liberty's possession that defendant owned an interest in such

obscene pictures and literature and that he and the defendant "bought them in partnership." When Cozzi made these accusatory statements defendant denied that they were true. The exhibits in question were found by the police officers in Cozzi's possession in his store before they made the first visit to defendant's home. Defendant was placed under arrest in Cozzi's store. According to the testimony of Police Officer Manger, the defendant stated to him, verbally, on the day following his arrest that "they [Exhibits 4, 5, 6 and 7] belonged to him and Cozzi both, they were in partnership *** that he left them there in Cozzi's store every night when he came off his peddling route, he didn't want them in the house." People's Exhibit 10, which was a statement in writing signed by defendant while he was in the custody of the police, was received in evidence. While this written statement contained a general recital that defendant had theretofore bought and sold obscene literature and pictures, it contained no admission that he was a partner of Cozzi or that he was interested as owner or part owner of the obscene literature and pictures which the police officer found in Cozzi's store. The written statement made no mention of or reference to the literature and pictures found in Cozzi's possession.

Defendant testified that he made no oral admission to the police officers or any of them that he owned or had any interest in the obscene exhibits found in Cozzi's store and he denied that he ever owned or had any interest in said exhibits. Cozzi did not testify. In view of the statement in the brief of defendant in error that "The People will admit that the conviction of plaintiff in error does not rest upon the proof of possession by him of the Exhibits 8 and 9, which were not literature but objects," we have omitted reference to the evidence concerning said exhibits.

The testimony of the police officer as to the state-

obscene literature and literature and in the [illegible] the defendant "bought them in partnership." [illegible] Donald [illegible] testimony statements defendant denied that they were true. The exhibits in question were found by the police of Doena in Don Ila possession in his store [illegible] they were the first visit to defendant's home. [illegible] at his place [illegible] in Donald's store. According to the testimony of police officer [illegible], the defendant stated to him, verbatim, on the day following the arrest that "they [exhibits #, 1 and 2] belong to [illegible] Donald both, they were in partnership *** and he [illegible] Donald's store every night when he [illegible] no didn't want them in the house." [illegible] exhibit 10, which was a statement in writing signed by defendant [illegible] in the custody of the police, was received in evidence. While this written statement contained a material admission that defendant had them [illegible] pictures, it contained no admission that he was a [illegible] of Donald or that he was [illegible] owner or part owner of the obscene literature and [illegible] which the police officer found in Donald's store. The [illegible] admission or reference to the literature [illegible] found in Donald's possession.

Defendant testified [illegible] the police officers or any of them had [illegible] any interest in the obscene exhibits [illegible] in Don Ila's store [illegible] he denied that he [illegible] any interest in the exhibits. Donald did not testify. In view of the statement in the brief of defendant in error that "the law [illegible] that the conviction [illegible] the proof of possession [illegible] were not literature but objects," [illegible] to the evidence [illegible].

The testimony of the police officer [illegible] to the state-

ment of Cozzi that Hebert owned the obscene literature and pictures in partnership with him, made in the presence of defendant and denied by the latter when made, was clearly incompetent and inadmissible. The rule applicable to proferred testimony of this character is stated in People v. Sarney, 351 Ill. 428, at p. 432:

> "An admission of guilt, may be implied from the conduct of a party charged with crime, who remains silent when a statement is made in his hearing that he was concerned in the commission of the crime, if the statement is made under circumstances affording him an opportunity to reply and where a man similarly situated would ordinarily deny the imputation. Such statement will never be admissible where the accused unequivocally denies the truth of the statement, or clearly shows that he does not acquiesce in it."

Defendant in error concedes the correctness of the foregoing rule stated in the Sarney case but questions the applicability of said rule to the situation presented in this case. The novel theory is advanced in the brief of defendant in error that the hearsay testimony of the police officer concerning the accusatory statements of Cozzi, which were denied by defendant when made, were vitalized and rendered competent by the subsequent oral admission by defendant that he owned the literature and pictures in question in partnership with Cozzi, which admission, as heretofore shown, the police officer testified defendant made to him the day after his arrest. No authority is cited by defendant in error in support of such theory and we are satisfied that none exists. The officer's testimony as to the incriminating statement made by Cozzi against the defendant and denied by the latter when made was pure hearsay and testimony concerning such a statement as was made by Cozzi "will never be admissible where the accused unequivocally denies the truth of the statement."

It is not claimed that the written statement signed by defendant contains any admission connecting him with the

various items of obscene literature and pictures found in Cozzi's store or that said statement tends in anywise to prove defendant's guilt of the offense charged in the information.

This brings us then to the consideration of the testimony of the police officer that on the day after his arrest defendant admitted orally to him that the obscene literature and pictures found in Cozzi's store "belonged to him and Cozzi both, they were in partnership." This is the only competent evidence in the record bearing upon defendant's ownership of the obscene literature and pictures involved herein. In considering and characterizing this type of evidence in People v. Christocakos, 357 Ill. 599, the court said at p. 603:

> "The other recourse of the prosecution to support the judgment is to the testimony of the two Police Officers that the Plaintiff in error admitted to them that he took the leather jacket from Grieshaber. Verbal admissions obtained from an accused person are subject to mistake and imperfection and should be received with great caution. It is only when admissions are deliberately made and precisely identified that the evidence afforded by them is of a satisfactory character."

(To the same effect are Marzen v. People, 173 Ill. 43; Dunn v. People, 158 Ill. 586; and Carlton v. People, 150 Ill. 181.)

The only admissions in the record "deliberately made and precisely identified," attributable to the defendant, are those contained in his written statement and, as already shown, these admissions have no tendency to prove defendant's guilt of the offense charged or to connect him in any way with the obscene literature and pictures found in Cozzi's store.

The same officer who testified to defendant's oral admission of guilt propounded the questions to Hebert, which, with his answers thereto, are incorporated in his written statement made and signed by him two days after the arrest. It is highly significant that, in the preparation of the written statement, this officer did not interrogate the

various items of obscene literature and pictures found in Cozzi's store or that said statement tends in degree to prove defendant's guilt of the offense charged in the information.

This brings us then to the question of the testimony of the police officer that on the day after his arrest defendant admitted orally to him that the obscene literature and pictures found in Cozzi's store "belonged to him and Cozzi both, they were in partnership." This is the only competent evidence in the record bearing upon defendant's ownership of the obscene literature and pictures involved herein. In construing and characterizing this type of evidence in People v. Chatsworth, 247 Ill. [illegible], the court said at p. 609:

> "The other reasons of the prosecution to support the judgment is to the testimony of the police officers that the defendant in error admitted to them that he took the leather jacket from Rhesl Bar. [illegible] obtained from an accused person are subject to hearsay and impeachment and should be received [illegible] with caution. It is only when admissions are definite, clear and precisely identified, that the evidence of [illegible] by them is of a satisfactory character."

(To the same effect are Kerner v. People, 147 Ill. [illegible]; [illegible] v. People, 198 Ill. 76; and Quinlan v. People, 140 Ill. 141.)

The only admissions in the case "either by me and precisely identified," attributable to the defendant, are those contained in the written statement [illegible]. Clearly above, these admissions have no tendency to prove defendant's guilt of the offense charged or to connect him in any way with the obscene literature and pictures found in Cozzi's store.

The same officer who testified to [illegible] his oral admission of guilt propounded the [illegible] to defendant, which with his answers thereto, [illegible] in the written statement made and signed by him [illegible] the arrest. It is highly significant that, in the preparation of the written statement, this officer did not interrogate the

defendant concerning the obscene literature and pictures found in Cozzi's store or even mention same. If, as the officer testified, Hebert voluntarily admitted to him the day after his arrest an interest in said literature and pictures and by implication constructive possession thereof, it would seem only natural that on the following day, when the written statement was secured, defendant's attention would be directed to his oral admission of specific guilt made on the previous day. If such an oral admission was voluntarily made, it appears to us that in procuring the written statement, which according to the officer, was also voluntarily and understandingly made, an attempt, at least, would be made to confirm the oral admission.

The testimony as to defendant's oral admission of guilt, standing alone, is too shadowy and tenuous to overcome the presumption of his innocence and we are impelled to hold that such evidence was clearly insufficient to establish his guilt beyond a reasonable doubt.

For the reasons stated herein the judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Scanlan, J., concur.

defendant concerning the obscene literature and pictures found in Cornell's store or even mention them. He, as the officer testified, "Robert voluntarily confided to him the [illegible] after his arrest on interest in said literature and pictures and by implication constructive possession thereof, it would seem only natural that on the following day, when the written statement was secured, defendant's attention would be directed to his oral admission of specific guilt made on the previous day. If such an oral admission was voluntarily made, it appears to us that in procuring the written statement, which nothing to the officer, was also voluntarily and unconstitutionally made, an attempt, at least, would be made to confirm the oral admission.

The testimony as to defendant's oral admission of guilt, standing alone, is too slender and tenuous to overcome the presumption of his innocence and we are compelled to hold that such evidence was clearly insufficient to establish his guilt beyond a reasonable doubt.

For the reasons stated herein the judgment of the Municipal court of Chicago is reversed.

JUDGE [illegible].

Friend, P. J., and Scanlan, J., concur.

42832

JOHN J. PHILLIPS, Appellee, v. ROBERT WHITE and EDWIN M. WHITE, co-partners doing business as ROBERT WHITE & CO., and FREDERICK B. TUTTLE, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover damages for personal injuries claimed to have been sustained by him through the negligence of defendants in maintaining a defective door handle on a building owned and operated by them. There was a jury trial, a verdict and judgment in plaintiff's favor for $300 and defendants appeal.

The record discloses that defendants were operators of a seven-story building located at the northeast corner of State and Lake street, Chicago. The building contains stores on the first floor and offices on the upper floors. There are five stores on State street and three on Lake street. One of the State street stores was occupied by a restaurant and another by a tavern. North of the building is an east and west alley. From this alley a door leads into the rear of the building - into a service room where there are freight elevators. Deliveries are made through this door. The back doors of the State street stores open into this freight room. Plaintiff was employed to solicit delinquent accounts and about 1:15 o'clock in the afternoon of February 8, 1941, after he had made a call at the Pure Oil Building, which is just east and north of the building in question, he went to the rear door of defendants' building on his way to the restaurant in the building, which faced

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JOHN J. PHILLIPS,

Appellee,

v.

ROBERT WHITE and JOHN [illegible],
co-partners doing business [illegible]
ROBERT WHITE & CO., and [illegible] BRUCE
B. TUTTLE,

Appellants.

MR. PRESIDING JUSTICE [illegible]

Plaintiff brought [illegible]
damages for personal injuries [illegible]
through the negligence of defendants [illegible]
handle on a building owned [illegible]
trial, a verdict and judgment [illegible]
defendants appeal.

The proof discloses [illegible] were operators of a
seven-story building [illegible]
Lake street, Chicago. [illegible]
and offices on the [illegible]
street and [illegible]
occupied by a restaurant [illegible]
building is an open [illegible]
into the rear of the [illegible]
freight elevator. [illegible]
doors of the state [illegible]
Plaintiff was employed [illegible]
o'clock in the afternoon [illegible]
call at the Pure Oil Building [illegible]
building in question, he [illegible]
building on his way to the [illegible]

State street; in opening the door which led from the alley a finger of his right hand was caught and injured, for which he sues.

The evidence as to whether the handle or knob of the door had been out of repair for some period of time was sharply conflicting and therefore the question was for the jury.

Plaintiff testified that "it was a wet, snowy day and so I took the shortest route possible" to the restaurant where he had eaten a number of times but that this was the first time he went through the rear door of the restaurant. That "I reached for the handle and pulled it open. And as I did the burrs -- it was a handle, about three-eighths of an inch wire handle set on a metal plate, which would remind you of a strong box handle. It would only open up half way to give leverage. *** The burrs were worn which caused the handle to go all the way back the other way and it jammed. *** I couldn't release my hand, **** " But "Someone came and he pried it open with a pair of plyers." He further testified: "Customers to the restaurant and tavern as well as delivery men" used this particular door.

Defendants contend that "Plaintiff was not an invitee onto that portion of the premises where the alleged accident occurred. His status was that of a licensee or tres asser." And since there was no claim made that defendants wilfully injured plaintiff the court should have sustained defendants' motion at the close of all the evidence for a directed verdict in their favor.

The testimony of plaintiff that the door in question was used by customers of the restaurant and tavern as well as delivery men was not contradicted. In these circumstances we think whether plaintiff was an invitee or a licensee or a trespasser was not a question of law for the court but one of fact for the jury. Upon an examination of the instructions given by the court to which no reference has been made by counsel for defendants(and no brief has been filed by plaintiff)the question whether plaintiff was an invitee, licensee or trespassert was in no way presented to the jury by any instruction.

The instructions were the stock instructions usually given in a personal injury case. In these circumstances we are not warranted in disturbing the verdict and judgment.

Defendants further contend that "Plaintiff failed to prove that defendants were guilty of negligence. There was no proof presented nor was it shown that defendants had either actual or constructive notice of the allegedly defective condition of the door handle," and that "the burden was upon him to show that this defective condition existed for a sufficiently long period of time to charge the defendants with constructive notice." We think the evidence offered by plaintiff as to the condition of the handle of the door was of such a character that the jury might well believe it had been in a defective condition for a considerable period of time. The testimony is to the effect that the metal handle or burr to the door was worn and we think it is common knowledge that it must have been in this condition for a considerable period of time - at least the question was for the jury.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

42852

WILLIAM B. BERRY,
Appellee,

v.

WILLIAM W. VINCENT,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

William B. Berry filed his complaint in chancery against defendant, William W. Vincent and others, praying that a warranty deed, absolute on its face, be decreed to be a mortgage and that defendant be required to account for the rents derived from the property. When the case was at issue it was referred to a master in chancery who took the evidence, made up his report and recommended a decree as prayed for in the complaint. Objections to the report were filed and overruled, they were ordered to stand as exceptions and after hearing, the court overruled them and entered a decree in accordance with the master's report. Defendant Vincent appeals.

The record discloses that James G. Berry, the father of plaintiff, died intestate January 19, 1933 owning property located at the northeast corner of 43rd street and Cottage Grove avenue, in Chicago, known as 800-812 E. 43rd street and 4255-59 South Cottage Grove avenue, which is the subject matter of this suit. It was improved by a nine-room brick house and a building in which there were nine apartments, seven stores and six offices and unencumbered. James G. Berry left him surviving his daughters, Sarah Porter and Elizabeth B. Vincent, who was the wife of defendant; his sons, William B. Berry, plaintiff, and James G. Berry, Jr., and a nephew and two nieces. Each of the four children of deceased inherited an undivided one-fifth interest in the property and the remaining one-fifth went to the two nieces and the nephew.

After the probate of the father's estate in the Probate court of Cook county, Elizabeth B. Vincent, one of the daughters, died June 13, 1935. Her will was probated in the Probate court of Cook county and the property in question was devised to defendant William W. Vincent. The record further discloses that defendant Vincent bought from some of the other heirs their interest in the property. In October, 1935, plaintiff's automobile had been repossessed by a finance company and he needed $80 to recover the car. He went to see his brother-in-law, the defendant, and asked if he could borrow the $80 but the loan was refused. October 29, 1935, plaintiff conveyed his one-fifth interest in the property by warranty deed to defendant for an express consideration of $80. It is this deed which plaintiff seeks to have the court decree was but a mortgage.

The record tends to show that the value of the property in October, 1935, was about $25,000 and that plaintiff's interest was worth about $5,000. Defendant in the answer which he filed admitted that the property at the time was worth about $12,000. The property was rented and the evidence shows that the gross income from it in 1933 was more than $6,000, in 1934, and 1935 more than $5,000 and from 1936 to 1941 the average was more than $600 per month. The net income was $500 in 1934, $550 in 1935, $200 in 1936 and $2,125 in 1940. In 1941 there was a writtwn contract to sell the property for $25,000 on which there was a deposit made of $2,250 but the deal was never consummated.

There is further evidence to the effect that the property was in charge of a real estate firm which collected the rents, etc., and refused to dsitribute any income to plaintiff Berry without Vincent's approval. But in 1940 the evidence tends to show that Vincent paid $75 to plaintiff's wife approximately every 60 days, which was one-fifth of the net income derived from the property. There is considerable other evidence in the record but upon a consideration of all the evidence and the master's report and decree we think it unnecessary to further detail it here.

The master found the facts to be substantially as above stated, He found that the deed was given as security for the $80 loan and recommended a decree that upon plaintiff paying defendant the $80 defendant reconvey one-fifth interest in the property to plaintiff and that defendant account for the rents and profits derived from the property. The court approved the master's report and a decree was entered in accordance with the recommendation of the master and the cause was rereferred to another master in chancery to state the account.

Counsel for defendant in his brief makes a number of points the substance of which is that under the evidence the deed was an absolute one and not in the nature of a mortgage but we think there is no merit in these contentions. All of the evidence shows that the conduct of defendant is wholly unconscionable. He gave but $80 for plaintiff's interest in the property which was worth about $5,000, and which defendant admits was worth $2400. There was considerable evidence afterward indicating that the property was to be conveyed back to plaintiff by defendant but we do not stop to discuss it for no decree could stand in this case except one holding the deed to be a mortgage. Nor is there any merit in defendant's contention that he set up affirmative matter in his answer to which no replication was filed and therefore the affirmative matter must be taken as true. The record discloses that evidence was introduced on these questions without objection that it was not admissible under the pleadings and it follows there is no merit in the contention.

Complaint is also made that the allowance of the master's fees is not warranted. That the master charged for taking and certifying 713 folios or oral testimony at 15 cents per folio, and counsel contends an examination of the record discloses there was an overcharge of $19. A further complaint to the master's fees is that the charge is in a lump sum -- not itemized as the law requires. As to this item the master certified as follows: "Fees to be Fixed by Court: Obtaining files; examining order of reference; docketing

causes; setting cause for hearing; serving notices of hearings; attendance at four hearings; examining pleadings; determining issues; considering testimony, pleadings and exhibits; preparing findings of fact and conclusions of law; and drawing report.....$175.00

Total .....$284.95"

In reply to these objections counsel for plaintiff say that no objections were made to the master's report which showed the master's proposed charges; that such objections were not made until after the decree was entered and that it is clear the question was never brought to the attention of the master or the chancellor. We think this contention is borne out by the record. But the fact that no objection to the charge was made in the trial court does not preclude the raising of that question in a court of review. Keuper v. Mette, 239 Ill. 586. Counsel also say that "the charge of $175 seems reasonable. We believe the master should not be penalized for failing, perhaps through an oversight, to state the time spent on these matters." Counsel further say that since by the decree the chancellor rereferred the case to a master for an accounting, the fees in question may then be taken up and determined.

In Comstock v. Morgan Park Tr. & Svgs. Bnk., 367 Ill. 276, the court in passing on the question of master's fees said: "the chancellor, in fixing master's fees for services not required by law to be itemized, should base the amount on the actual number of days that were reasonably required in their performance. *** The amount to be allowed as per diem should be based on evidence heard 'before the chancellor on principles not inconsistent with natural justice.'"

In the instant case the allowance of the master's fees under the authorities was unwarranted and for that error the decree will be reversed and the matter remanded to the chancellor with directions to hear whatever testimony may be presented by the master in chancery after reasonable notice to him. In all other respects the decree will be affirmed. Each party will be required to pay his own costs in this court, and the costs in the trial court, including the

4.

causes; nothing cause for [illegible]; [illegible]
tendance at four hearings; [illegible]
counsel [illegible] best many, [illegible]
of fact and conclusions [illegible] .....

.....

In reply to these objections [illegible]
no objections were made to the [illegible]
ber's proposed changes; [illegible] made until aft
the decree was entered and the [illegible]
brought to the attention of the [illegible]
this contention is borne out by the [illegible]
objection to the entry [illegible]
the making of [illegible]
(20 Ill. 588. [illegible]
reasonable. We believe the [illegible]
persuade enough to overcome [illegible]
matter." General Tuleson [illegible]
reversed the case to [illegible]
may then be taken up [illegible]

In Goodhoof v. [illegible]
court in proceeding on the [illegible]
chancellor, in fixing [illegible]
to be litigated, should [illegible]
that were reasonably [illegible]
to be allowed [illegible]
the chancellor on [illegible]

In the instant case [illegible]
the authorities are [illegible]
be reversed and the [illegible]
to make whatever testimony [illegible]
after reasonable notice to [illegible]
will be affirmed. [illegible]
in this court, and the costs in [illegible] [illegible]

master's fees, should be paid by defendant.

The decree of the Superior court of Cook county is affirmed in part, reversed in part and remanded with directions.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

Niemeyer, J., and Matchett, J., concur.

42862

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

MARGARET E. KABANA,
Plaintiff in Error.

ERROR TO COUNTY COURT
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

An information was filed charging defendant with the violation of §24, of the Medical Practice Act (Ill. Rev. Stats. 1943, ch. 91, §24.) Defendant entered a plea of not guilty, waived a trial by jury and after hearing the court found her guilty and imposed a fine of $200. She prosecutes this writ of error.

The information charged that defendant on July 21, 1941, not having a license as required by the statute to treat human ailments did "unlawfully, attach the title Doctor *** or some other word *** to her name indicative that she was engaged in the treatment of human ailments as a business," to-wit: that she caused "her name to appear, with the name of another person, on the bottom of each of each of six printed booklets, distributed to members of the public, in the reception room of her office, at 188 West Randolph street, Chicago, Illinois, entitled 'Asthma. What will Chiropractic Do For It.' 'Appendicitis - What will Chiropractic Do For It' 'Heart Trouble - What will Chiropractic Do For It?' 'Nervousness - What will Chiropractic do for it' 'Liver Trouble - What Will Chiropractic Do For It,' 'Gall Stones What Will Chiropractic Do For It,' in the following manner, to-wit: 'A. FRED KABANA and MARGARET E. KABANA SCIENTIFIC CHIROPRACTORS.'

"And caused her name to be printed on a pamphlet with the name of another person, entitled 'MAHATMA GHANDI - RESTORED TO HEALTH THROUGH CHIROPRACTIC,' in the following manner to-wit: ' A. FRED

PEOPLE OF THE STATE OF [illegible]
Defendant in error,

v.

MARGARET E. [illegible],
Plaintiff in error.

MR. PRESIDING JUSTICE [illegible]

An information [illegible] tion of 326, of the [illegible] ch. 38, 324.) Defendant [illegible] trial by jury and after [illegible] imposed a fine of [illegible].

The information [illegible] not having a license [illegible] alimente did "unlawfully [illegible] word ** to her name [illegible] ment of human aliment [illegible] "her name to appear, with [illegible] of each of each of [illegible] the public, in the [illegible] Randolph street, Chicago, Illinois, [illegible] Chiropractic Do For It.' [illegible] Do For It! Heart Tro[illegible] 'Nervousness - [illegible] What Will Chiropractic [illegible] practic Do For It,' in the [illegible] AND MARGARET E. [illegible]

"And caused her name to be printed [illegible] of another person, entitled [illegible] THROUGH CHIROPRACTIC,' in the [illegible]

KABANA AND MARGARET E. KABANA- SCIENTIFIC CHIROPRACTORS.'" And that she caused her name to appear above a display of pictures and literature in the lobby of the building in which her office was located, all in violation of §24, of the Medical Practice act.

Louis Janczak, an inspector for the State Department of Education and Registration testified that on July 21, 1941, he made an investigation in the large office building located at 188 West Randolph street, Chicago; that there were display windows in the lobby on which appeared various advertisements such as "gent's firnishings" etc. and a display window of Kabana and Kabana on which appeared pictures of Jack Dempsey, Mahatma Gandhi and writing matter about chiropractors and treatment of different things. That the words "Scientific Chiropractors" appeared in the display; that after examing the display in the lobby he went upstairs to Room 1508 or 1505, on the 15th floor; that there was embossed lettering on the door, "Kabana & Kabana;" that as he entered the office there was a young lady sitting at the desk; that he told her he had a pain in his back; that she then gave him a card which he filled out with his name and address and what work he was doing, etc.; that thereupon the young lady said something about Mr. Kabana being out fishing and that Mrs. Kabana would interview him; that he was then shown into another room where he met a woman who introduced herself as Mrs. Kabana. "She asked me what my trouble was, and I told her that I had some pains in my back, and she said, 'We cure a lot of people with a lot of pains, with heart trouble and kidney trouble and different things,'" That she told him she would not know what ailment he had until he had an X-ray taken and she sent him into an adjoining room where he met another young woman and after he stripped to the waist she took an X-ray picture of him. That there was a rack on the wall on which a number of pamphlets were placed and he took several of them with him when he left; that

KABANA AND MANDRAKE [illegible] 30 [illegible]

that she caused her name to appear above a display of [illegible] and literature in the lobby of the building in [illegible] was located, all in violation of the medical practice act.

Louis Jacobson, an inspector for the State Department of Education and Registration testified that on July [illegible] made an investigation in the [illegible] 188 West Randolph street, Chicago; that [illegible] in the lobby on which appeared [illegible] "gent's furnishings" etc. and [illegible] on which appeared pictures of [illegible] writing matter about contraceptors and [illegible] That the words "Scientific Chiropodistry" appeared in the directory; that after examing the display in the lobby [illegible] Room 1808 or 1809, on the 18th Floor; that there was a [illegible] lettering on the door, "Kabana [illegible]" [illegible] office there was a young lady [illegible] her he had a pain in his back; that he had been given [illegible] he filled out with his name and address and what work [illegible] etc.; that thereupon the young lady said something about [illegible] being out fishing and that Mr. Kabana would [illegible] that he was then shown into another room where [illegible] herself as Mrs. Kabana. "She asked me what my trouble was, and I told her that I had some pains in my [illegible] a lot of people with a lot of pains, that [illegible] trouble and different things." [illegible] know what ailment he had until he [illegible] him into an adjoining room where [illegible] after he stripped to the waist she took [illegible] That there was a rack on the wall on which [illegible] were placed and he took several of them with [illegible] that

he did not ask anyone if he could take them because he understood they were there for anyone who came in to help himself. That no one made any objection when he took the pamphlets; that he did not get them in the reception room but in the room where the X-ray was taken. The seven pamphlets were then offered in evidence. Six of them are in the form of booklets consisting of a few printed pages. On the cover of the first one appears the following: "Nervousness. What Will Chiropractic do for it? Chiropractic Health Bureau Laymen Unit No. 4. A. Fred Margaret E. KABANA & KABANA Scientific Chiropractors Chicago Office, 188 W. Randolph St., Phone. Dearborn 1978-9. New Cicero Office, 1907 S. Austin Blvd., Phone, Cicero 987." Printed on the cover of the second one is: "Appendicitis. What will Chiropractic do for it?" And on the bottom is the same printed matter as quoted from Exhibit 1. On the cover of the next booklet is printed: "Asthma;" the next one, "Heart Trouble;" the next "Gall Stones;" the next "Liver Trouble;" and below this appears the same printed matter as above quoted from Exhibit 1. There are 12 printed pages in Exhibit 1 about nervousness, the cause and what to do for it. It then discusses how chiropractic is effective in treating nervousness. The printed matter in each of the other exhibits is in reference to the ailment mentioned on the cover and states that the various disorders may be cured or benefited by chiropractic.

Exhibit No. 7 is larger in size but only contains four pages, on the front page of which appears: "Mahatma Ghandi Restored to Health Through Chiropractic." And at the bottom of page 4 appears the following: "Chiropractic Health Bureau LaymentUnit No. 4. A. Fred, Margaret E., Kabana & Kabana."

The defendant did not testify but Arthur R. Larson, called in her behalf testified that the office of Kabana & Kabana is located on the 14th floor of the building at 188 West Randolph street. This is all the evidence in the record.

[illegible]

Counsel for defendant contend that "The information fails to state a crime, nor does it inform the defendant of the nature of the accusation against her." We think the contention cannot be sustained. The substance of the charge made against the defendant in the information is that she was practicing "the treatment of human ailments" as a business without being licensed to do so as required by the statute. People v. DeYoung, 309 Ill. App. 525, affirmed 378 Ill. 256. The information specified that she was a scientific chiropractor; that she distributed printed booklets which claimed that she could alleviate human troubles caused by appendicitis, heartctrouble, nervousness, liver trouble, etc.; that she also caused her name to be printed on a pamphlet advising that health might be restored by chiropractic treatments and that this treatment had been beneficial to Mahatma Ghandi. From the evidence which is undisputed, it is clear that defendant was holding herself out to the public as one who could and was treating successfully human ailments by giving chiropractic treatments. That she was a scientific chiropractor and engaged in that work as a business. There was a suite of offices, her name appeared on the door and on the directory downstairs. In these circumstances it is obvious that the judgment of the County court of Cook county must be affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

[illegible]

42874

In the Estate of
JOHANNA E. SCHAFFHAUSER,
Deceased.

FLORA M. GAEBEL, Executrix of
the Last Will and Testament of
Johanna E. Schaffhauser, Deceased,
Appellant,

v.

THE TRUST COMPANY OF CHICAGO,
Administrator de bonis non with
the Will annexed of the Estate of
Johanna E. Schaffhauser, Deceased,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Flora M. Gaebel, as executrix of the last will and testament of Johanna E. Schaffhauser, deceased, seeks to reverse an order entered by the Circuit court of Cook county May 21, 1943, by which objections of the Trust Company of Chicago, as administrator de bonis non with the will annexed, of the estate of Johanna E. Schaffhauser, deceased, and of Selma Clapburn, to one item of $301.98 were sustained and the executrix was ordered to file an amended, final account showing that she had paid the $301.98, to the Trust Company.

The record discloses that Johanna E. Schaffhauser died March 15, 1936, leaving a purported last will and testament dated July 25, 1935. The will was admitted to probate by the Probate court of Cook county May 21, 1936. Flora M. Gaebel was appointed executrix and she qualified and proceeded to administer the estate. She filed her inventory showing real and personal property. The will directed (1) that all debts and funeral expenses be paid, (2) all property belonging to the testatrix and in the possession of the daughter, Selma, was devised and bequeathed to Selma and all debts which Selma owed her mother were forgiven, (3) to her son,

Oscar, she forgave him all money that he owed to his mother and a similar provision was made as to the daughter, Flora, mentioning three notes aggregating $3,000 which Flora and her husband had given the testatrix and which were forgiven. All the remainder of the estate, including the life insurance, was to be divided into two equal parts, one of the parts was bequeathed to Flora and the other equal part to Flora, as trustee for her brother, Oscar. Flora as trustee was to manage and care for the property and was given broad powers to invest, etc. The will then provided: "The said trustee shall from time to time, during the existence of this trust, pay to my son, Oscar Schaffhauser, during his lifetime, out of said trust estate, such sum or sums of money as in the discretion and judgment of said trustee shall be sufficient and necessary to aid him in the comfortable support, maintenance, clothing, medical and other care, and such other necessary expenses as in the judgment and discretion of said trustee may be proper for my said son." And that the payment should be made from the income or principal to Oscar personally but that the trustee in her discretion and judgment might make payments out of the trust estate to any person or persons to whom she might become liable for "clothing, rent, board, medical care or otherwise, for the benefit of" Oscar.

May 13, 1937, Selma filed a bill in the Circuit court of Cook county praying that the will of her mother, which had been probated, as above stated May 21, 1936, be declared null and void. January 21, 1940, a decree was entered holding the will to be void. Afterward, March 3, 1941, another will of Johanna dated November 6, 1926, was admitted to probate by the Probate court of Cook county. Oscar, the son, was appointed executor by this will and he qualified as such. He later resigned and the Trust Company of Chicago was appointed the administrator de bonis non with the will annexed.

Ocean, [illegible] for [illegible]
a similar provision [illegible]
three notes [illegible] which [illegible]
given the essential and [illegible]
of the country, but with [illegible]
into two equal parts, [illegible]
and the other equal part [illegible]
Ocean. [illegible] a [illegible] to
was given [illegible]
"The [illegible] land from [illegible]
or this [illegible], may be [illegible]
lifetime, out of [illegible]
in the direction [illegible]
and necessary to [illegible]
clothing, a [illegible]
[illegible] in the judgment [illegible]
my said son." [illegible]
or [illegible] to [illegible]
[illegible]
to any person or [illegible]
"clothing, food, [illegible]
of" Ocean.

[illegible]

Cook county [illegible]
probated, [illegible]
January 21, 1940, [illegible]
[illegible], [illegible]
6, 1940, [illegible]
Ocean, [illegible]
qualified [illegible]
Chicago [illegible]
answer.

August 21, 1941, Flora as executrix, filed in the Probate court what she designates her "first and final account." This shows receipts of $1,253.83, and certain shares of stock issued by a South American company. Then follow disbursements aggregating $872.95 which are for the funeral expenses of Johanna, court costs and attorney's fees. Continuing there are several pages of the account showing moneys paid by Flora as executrix to her brother, Oscar, covering the years beginning April 14, 1936 and ending April 16, 1940. These are itemized in the account beginning with item 14 and ending with item 281. The recapitulation of the account shows that Flora had received $1,253.83 from the estate and had disbursed $2,674.68, showing that she had paid out $1,420.85 more than she had received.

This account shows that Flora had paid to her brother, Oscar, beginning April 14, 1936 and ending May 10, 1937, $401.61. These payments were all made by Flora, as executrix, before the bill to contest the will was filed May 13, 1937. After the filing of the account, August 21, 1941, Flora filed an amended account May 13, 1943, pursuant to the order of court in which she took credit for the $301.98 involved in this appeal, showing that she, as executrix, had paid to herself as trustee, sums aggregating this amount.

Counsel for the Trust Company, which alone files a brief in this court by which it is sought to have the order of the Circuit court affirmed, says: "the executrix filed an amended final account on May 13, 1943 in which she took credit for the sum of $301.98 (shown in the original account to have been paid to Oscar Schaffhauser) as paid to herself as Trustee." It therefor appears without dispute that the items aggregating $301.98 were paid by Flora, the executrix, to her brother, Oscar, pursuant to the terms of the will of her mother which was probated May 21, 1936. There is no suggestion made by counsel for the Trust company or anyone else that these payments were not made by Flora in good

August 21, 1941, [illegible] court what are designated as "[illegible] above receipts of $1,[illegible] by a South American company. Then follow [illegible] $872.35 which are for the [illegible] and attorney's fees. Continuing [illegible] account showing moneys paid by [illegible] Ocean, covering the years beginning with [illegible] April 16, 1940. These are [illegible] item 14 and ending with item [illegible] shows that plaintiff had received [illegible] disbursed $2,074.85, showing [illegible] than she had received.

This account shows [illegible] beginning April 14, 1938 and ending [illegible] payments were all made by plaintiff [illegible] contest the will was filed [illegible] account, August 21, 1941, [illegible] 1943, pursuant to the order of court [illegible] the $301.35 involved in this [illegible] had paid to herself as trust [illegible]

Counsel for the [illegible] this court by which it [illegible] court affirmed, saying: "The account [illegible] account on May 1, 1941 [illegible] $301.35 (shown in the original account [illegible] satisfaction) as said to [illegible] without dispute that the [illegible] plaintiff, the executrix, to [illegible] terms of the will of her mother [illegible] There is no suggestion made by [illegible] anyone else that these payments were [illegible] made by [illegible]

faith and in accordance with the terms of the will, to Oscar, but there is a great deal of argument by counsel for both sides as to whether the payments were made by Flora as executrix or as trustee. We are in no way interested in this question and cases ought not to be disposed of on such an unsubstantial point.

In Smith v. Smith, 168 Ill. 488, which was a suit filed to contest the validity of a will, the court said: "If, therefore, the result of the present suit had been a decree setting the will aside, the letters testamentary originally issued to Dr. Wohlgemuth would have been thereby revoked. But the general rule seems to be, that the acts of an executor after probate are valid, notwithstanding the subsequent setting aside of the probate. Sales made by the executor, or payments made to him, will be sustained, although the probate is afterwards set aside."

In the instant case, as above stated, there is no contention but that the payments were made by Flora, the executrix, to her brother in good faith. In these circumstances we think it obvious that she nught not be required to again make payment of the same amount, $301.98, to defendant Trust Co. as administrator.

For the reasons stated, the order of the Circuit court of Cook county is reversed.

ORDER REVERSED.

Niemeyer, J., and Matchett, J., concur.

fallen and in accordance with the [illegible]
but there is a great deal of [illegible]
as to whether the payments [illegible]
trustee. We are in no way interested in [illegible]
ought not to be disposed of on such [illegible]

In Gaskin v. Gaskin, 10 Ill. App. [illegible]
contest the validity of a will, [illegible]
result of the agreement made [illegible]
the letters testamentary [illegible]
have been thereby revoked. [illegible]
the date of an account [illegible]
the subsequent retaking [illegible]
executor, or payments made [illegible]
the probate is otherwise [illegible]

In the instant case, [illegible]
tion but that the payments [illegible]
her brother in good faith. [illegible]
obvious that she might not be [illegible]
same amount, $500.00, to defend [illegible]

For the reasons set forth, the [illegible]
look confirmed.

Affirmed, [illegible]

321 I.A. 638

42884

FRANK J. HUBKA, Administrator of the Estate of FRANK BRUCE HUBKA, Deceased,
Appellant,

v.

RAY E. McCORMICK and ALICE D. McCORMICK,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover for the wrongful death of his deceased son, Frank, on account of the claimed negligence of defendant, Alice D. McCormick, who was driving her husband's automobile which struck and killed the son. There was a jury trial, a verdict and judgment in defendants' favor and plaintiff appeals.

The record discloses that about 4:30 o'clock on the afternoon of April 7, 1941, Frank Bruce Hubka, a child then not quite six years of age, was crossing Addison Road, from south to north in the village of Riverside, Cook County, Illinois. At the time the defendant Mrs. McCormick, was driving an automobile west in Addison Road. The car struck the child as a result of which he died the same day.

Plaintiff's theory of the case is that under the law the child being a little more than five years of age was incapable of being guilty of any negligence. This is the law. Maskaliunas v. C. & W. I. R.R. Co., 318 Ill. 142. And counsel contend that Mrs. McCormick was negligent in driving her car at about 25 miles per hour when the child was in full view of her and that she did not signal her approach, slacken her speed or do any other thing to avoid the collision. Their argument is that the verdict of the jury in defendants' favor is against the manifest weight of the evidence.

Photographs of the place where the accident occurred are in the record. The evidence is to the effect that Addison Road runs generally east and west and is 22 feet wide from gutter to gutter there being no curbing. Herbert street is the same width and runs in a northwesterly direction and ends at Addison Road.

Counsel for plaintiff in giving plaintiff's theory of the case, after stating the above facts as shown by the evidence, continues: "On the south side of Addison Street the sidewalk is higher than the grade of the street and the parkway from the sidewalk to the street-line at the gutter is sloping. The child ran down the hill on the south side of the street to the south line of Addison Street, and then walked across Addison Street, and as he reached a point a few feet from the gutter on the north side of the street he was struck by the automobile *** knocked down by the front of the car, the entire car passed over him and proceeded about one hundred feet from the point of the collision before it was brought to a stop." On the other side, defendants' theory is "that the accident was caused by the sudden darting in front of defendants' automobile" by the child and that he ran not only down from the parkway to the south side of the street but that he also ran across the street in front of the automobile; that the question was for the jury and that their verdict, sustained as it was by the trial judge, cannot be said by this court to be against the manifest weight of the evidence.

Erenio Desolvo, called by plaintiff, testified that he had worked part time for seven years for the Post Office, in the export department, and part of the time as a scissors grinder. That just before the accident he was walking west on the sidewalk south of the roadway of Addison Road and saw Frank, the child, standing on the parkway on the south side of the street about 100 feet from him; that Frank started to go down the hill towards the roadway; that he ran down to the roadway and then walked across towards the north when he was struck by the automobile. On cross-examination it was brought

photographs of the place [illegible]

in the record. The evidence is so [illegible]

runs generally east and west [illegible]

gutter there being no curbing [illegible]

and runs in a northerly [illegible]

Counsel for plaintiff [illegible]

case, after stating the [illegible]

tinues: "On the south side [illegible]

than the grade of the street [illegible]

the street-line at the gutter [illegible]

hill on the south side of [illegible]

street, and then walked along [illegible]

point a few feet from the curb [illegible]

an attack by the automobile [illegible]

the entire car passed over him [illegible]

from the point of the collision [illegible]

the other side, determined [illegible]

by the sudden darting in front of [illegible]

child and that he was not [illegible]

side of the street out [illegible]

of the automobile; that [illegible]

verdict, sustained as it was [illegible]

by this court to be [illegible]

Frank Bacolve, called by [illegible]

worked part time for [illegible]

department, and part of [illegible]

before the accident he [illegible]

the roadway of Addison [illegible]

pavement on the north side of the [illegible]

Frank started to go down the [illegible]

down to the roadway and then [illegible]

he was struck by the automobile. On cross-examination [illegible]

out that this witness had testified shortly after the accident before the coroner who was holding an inquest and in response to questions put to him by the coroner he testified that he saw Frank running pretty fast, and there were further discrepancies as to the speed, etc., of the automobile and as to the place it stopped after the accident.

Plaintiff also called Gertrude N. Krueger and Norma Wagner both of whom lived in Riverside. Mrs. Wagner was driving her automobile east in Addison Road and Mrs. Krueger was riding with her. She stopped in front of Mrs. Kruger's house and waited a short time until Mrs. McCormick's automobile which was coming west passed, when the accident occurred.

Mrs. McCormick who could best tell how the accident occurred, was placed upon the witness stand but plaintiff objected to her competency which objection the court properly sustained. Ill. Rev. Stats. 1943, ch. 51, §2. In discussing this statute in Schampon v. Speis, 285 Ill. App. 23, we said: "This is sometimes called the 'Dead Man's Statute.' Wigmore on Evidence (2nd ed.) §578, p. 1005, says that this rule of incompetency rests on 'some vague metaphor in place of a reason' and aptly asks, can it be more important to save dead men's estates 'than to save living men's estates from loss by lack of proof?' The meagreness of testimony as to the instant occurrence emphasizes this criticism."

Upon a careful consideration of all the evidence in the record and the arguments of counsel we are of opinion that we would not be warranted in holding that the verdict of the jury, approved as it was by the trial judge, is against the manifest weight of the evidence. They saw and heard the witnesses testify and were in a better position to determine the truth of the matter in controversy than are we in a court of review where we have but the printed page before us.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

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SAMUEL T. COHEN, Appellant, v. BENJAMIN OGUSS, RAYMOND SHER, and LIBERTY NATIONAL BANK OF CHICAGO, a National Banking Association, as Trustee, Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

4

321 I.A. 638

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Samuel T. Cohen filed his complaint in equity against Benjamin Oguss, Raymond Sher, Liberty National Bank of Chicago, as Trustee, and afterwards Joseph G. Engert was made an additional defendant, praying that defendants reconvey to him an undivided one-half interest in a seven story building consisting of 70 apartments; for an accounting and that he be decreed to be a beneficiary of the trust.

Defendants Benjamin Oguss, Raymond Sher and the Liberty National Bank denied the charges made against them in the complaint and that plaintiff was entitled to any relief. Defendant Joseph G. Engert disclaimed any interest in the property. The case was tried before the chancellor who found in favor of defendants and the suit was dismissed for want of equity. Plaintiff prosecuted an appeal to the Supreme court where upon consideration the cause was transferred to this court. Cohen v. Oguss, 384 Ill. 353. Many of the facts are stated by the Supreme court in its opinion so that it will be unnecessary for us to restate many of them here.

Samuel T. Cohen, plaintiff, was a lawyer licensed to practice in Illinois October 15, 1936, and about October, 1939, he met defendant, Oguss. Cohen was then 24 years old. In January, 1940

they purchased an uncompleted apartment building located at 900 Argyle street, Chicago, for $52,000. The construction of the building was commenced in 1929 but was still uncompleted when the purchase was made. There was a large amount of unpaid taxes and penalties. Each was to have an undivided one-half interest in the property. Oguss paid $47,000 on account of the purchase price and Cohen $5,000. The two parties entered into an agreement February 15, 1940, which goes into detail as to the rights of the parties and their liabilities growing out of the purchase of the property. Among other things, Cohen who claimed to know a great deal about tax matters, was to bring a legal proceedings so that the taxes might be reduced "without compensation to Cohen for professional services." In consideration of this Oguss agreed that if and when the court adjudicated the amount of taxes that would clear the property, he, Oguss "at his option" would pay the full amount of the taxes provided they did not exceed $13,000 and that if Cohen failed to reduce the tax, "it is agreed that premises shall be sold 'as is' subject to taxes and special assessments, and profits shall be shared equally and losses borne equally." The agreement further provided that if the taxes were reduced to $13,000 that "Oguss contemplates to get a temporary loan" to pay the taxes and that if he was successful in borrowing the necessary funds he would at once reimburse himself "from proceeds of a first mortgage loan." Cohen was successful in having the taxes reduced to $6,544.74. Afterwards the parties secured estimates as to what it would cost to complete the building and it was found it would cost about $25,000 more than the parties had contemplated but they endeavored to borrow the necessary funds from the defendant bank with which Oguss did business and with two other concerns but their application for a loan was refused.

The evidence further shows that when Cohen paid the $5,000 on account of the purchase price, as above stated, he borrowed

they [illegible] on [illegible]
Argyle [illegible], [illegible]
ing was [illegible]
ohere was made. There [illegible]
altion. [illegible]
property, [illegible]
Cohen $5,000. The two [illegible]
18, 1940, which [illegible]
and their liabilities [illegible]
among other things, [illegible]
ten months, [illegible]
might be reduced [illegible]
services." In consideration [illegible]
when the court [illegible]
the property, [illegible]
of the taxes involved [illegible]
Cohen failed to [illegible]
be said tax lien [illegible]
profits and [illegible]
agreement further provided [illegible]
$15,000 that "[illegible]
the taxes and that [illegible]
funds he would [illegible]
mortgage loan." [illegible]
to $6,844.74. [illegible]
what it would cost [illegible]
would cost about $5,000 [illegible]
they endeavored [illegible]
bank with which [illegible]
but their application for [illegible]

The evidence [illegible]
on account of the [illegible]

$2,500 from the Liberty Bank but it refused to loan him the $5,000 unless Oguss would guarantee payment of the additional $2,500 which he did. That bank also stated that it would not loan any more money to Oguss, who wanted to borrow to complete the building because his credit had been extended to such an extent that the bank would make no further loan. At this stage of the proceeding it appeared that the parties would not be able to complete the building for lack of funds and there was talk of selling the building. The feeling between Cohen and Oguss became somewhat strained and there were talks by their counsel that a partition suit might be necessary.

The Supreme court in its opinion said: "On April 1, 1940, Cohen sold to Joseph G. Engert half of his one-half interest. April 22, 1940, Cohen and Engert disposed of their one-half interest to Raymond Sher for $16,400, representing the return of their investment of $5,000, a profit of $6,500, and attorney's fees of $4,900 to Cohen incident to the tax litigation. On the day last named, Cohen and Engert assigned their interest to Oguss, who, in turn, executed a direction to the Liberty National Bank, ordering a conveyance to Sher. By deed dated May 10, 1940, the bank conveyed to Sher and his wife. June 21, 1940, Sher, joined by his wife, executed a deed to the bank, as trustee, under a new trust, No. 3047. A trust agreement then executed designated Sher as sole beneficiary. June 24, 1940, Sher gave a written direction to the bank to execute, as trustee, a note for $100,000 secured by a trust deed. August 9, Sher executed an assignment of a one-half interest in the trust to Arthur J. Kramer, which, on August 10, Kramer assigned to Oguss. October 7, 1940, Oguss delivered the assignment to the trustee bank." Shortly thereafter the building was completed, furnished and ready for occupancy when Cohen claimed that he had been defrauded

$32,500 from the [illegible]

$8,000 under [illegible]

$2,500 which he did. [illegible]

loan any more money [illegible]

the building [illegible]

that the bank would [illegible]

proceeding it [illegible]

complete the building for [illegible]

selling the building. [illegible]

become somewhat [illegible]

that a partition suit [illegible]

The supreme court [illegible]

Doran sold to [illegible]

April 12, 1910, [illegible]

to Raymond Abor for [illegible]

years at 6% [illegible]

$4,800 to Doran [illegible]

last named, Doran [illegible]

who, in turn, executed [illegible]

ordering a conveyance [illegible]

bank conveyed to [illegible]

Joined Dynia alle, [illegible]

under a new trust, [illegible]

designated [illegible]

written direction [illegible]

for $100,000 [illegible]

assignment of a [illegible]

Kramer, which, on [illegible]

7, 1940, [illegible]

shortly thereafter [illegible]

ready for occupancy when [illegible]

out of his one-half interest in the property and that the several conveyances of it were a sham and done to conceal the fact from him that Oguss was a half owner; that he understood Oguss was not interested in the property.

The record is more than 1,700 pages. Plaintiff, by his evidence sought to prove that he had been cheated out of his interest in the property, On the other hand defendants' evidence was to the effect that Cohen had been well treated in the entire transaction and that all that the defendants did was in every way fair and equitable.

The chancellor, in deciding the case said: "If there were any legal questions concerning which I felt there was considerable doubt, I would examine any brief you were willing to submit. But, I have not the least doubt of this case, Mr. Andalman, [counsel for plaintiff] not in the least. I felt at first there was a question of fact and the Court, like a jury, gets his impression of the witnesses. My impression of the plaintiff was that he was a very skillful, adroit and capable young man and a very resourceful bargainer. He was a match for Oguss or Sherwor anyone.

"Now, I was very well impressed with Oguss' testimony. He impressed me as a thoroughly, truthful man, an intelligent man and moreover, a very kindly and well disposed man. The contract he made with Cohen shows that. His trwatment of Cohen after it was made, when Cohen was unable to raise ewen a fraction of the sum which Oguss was raising, when he endorsed Cohen's note at the bank and got him the $2,500 reveals, in my opinion, a very high type of man. That was my impression of him on the witness stand.

"From the evidence in this case, I have no other means of deriving any conclusion with respect to the witnesses, I have to judge from their demeanor on the stand, I see no equity whatever in the plaintiff's case." And the court ordered that the suit

out of [illegible]

covered coverture [illegible]

fight from [illegible]

Queen was not [illegible]

The reason [illegible]

evidence non [illegible]

[illegible] in [illegible]

due to the [illegible]

transaction [illegible]

was fair [illegible]

The [illegible]

more any legal [illegible]

considerable [illegible]

to sound. [illegible]

[illegible] [illegible]

first there [illegible]

[illegible] plaintiff=

[illegible]

[illegible]

or [illegible] or [illegible].

Now, I [illegible]

[illegible]

and moreover, [illegible]

[illegible]

[illegible]

[illegible]

the bank [illegible]

in a type of [illegible]

[illegible]

Upon the [illegible]

[illegible]

judge from [illegible]

in the [illegible]

be dismissed for want of equity.

Upon an examination of the briefs andcargument of counsel and the evidence in the record, we are in entire accord with what the chancellor said when he decided the case.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

42829

35 32

MORRIS GELMAN,
Appellee,

v.

C. F. WENDRICK, Jr.,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

4

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of $7,816 entered on the verdict of a jury as directed by the court. The complaint was filed June 2, 1942, and was based on a note for the sum of $7,000, dated November 29, 1938, payable on or before two years from date to the order of plaintiff, without interest, and signed by the defendant. The note states on its face that there is delivered with it as collateral security for payment thereof 50 shares of the preferred and 20 shares of the common stock of the Wendrick Steel Corporation.

The note was past due and upon the trial was produced and offered in evidence by the plaintiff. Two affirmative defenses were attempted to be interposed. One was that the delivery of the note was conditional and that the condition had not occurred; the other that the supposed obligations thereof had been released.

The defense of conditional delivery was raised by defendant's amended answer. Plaintiff moved to strike it. The motion was denied. Plaintiff then replied specifically.

Upon the trial defendant made an offer to prove on this point, which was properly excluded, we think, by the court. The offer is somewhat lengthy. In his opening statement attorney for

defendant said defendant expected to show plaintiff and defendant were friends and had been in a number of business transactions together; that in October, 1938, they organized the Wendrick Steel Corporation, which was in business at 53 West Jackson Boulevard; that plaintiff was vice president and one of the original stockholders of the corporation; that under a verbal agreement --- (here attorney for defendant objected that the written contract (the note) could not be varied as to its terms by parol evidence). The court inquired whether this had been passed on, to which attorney for defendant said, "By Judge Prystalski, twice." The trial judge then remarked that he could not pass on it then since he had not heard what Judge Prystalski had. Attorney for defendant then continued, saying that early in November, 1938, it was orally agreed "between that parties that Mr. Gelman would endorse and return his stock for $7000 to the corporation, that the corporation would pay him $100 a month on the money that he had, *** invested in the corporation, and he wanted some evidence as to the indebtedness, or what he had invested in this corporation, to the extent of $7000, at $100 a month, and a plan was evolved whereby stock of an equal amount, that is, 50 shares of preferred stock, and 20 shares of common stock of the Wendrick Steel Corporation, would be issued by the corporation, in the name of the defendant, Carl F. Wendrick, Jr., and by him endorsed, and Mr. Wendrick would sign a note for $7000 without interest, and deliver the note and the stock as collateral security to plaintiff solely and conditionally upon this oral agreement that Mr. Gelman was to look to the corporation for payment." The attorney for plaintiff then stated, "I don't like to interrupt you but you are going out of your way. Judge Prystalski overruled him and why bring that in except for the purpose of prejudicing the jury." There was argument of counsel, and then outside of the presence and hearing of the jury this colloquy:

defendant said counsel [illegible]
were friends [illegible] had been [illegible]
together; that is [illegible]
Corporation, [illegible]
plaintiff was the [illegible]
of the corporation; [illegible]
for defendant objected [illegible]
not be asked or to [illegible]
inquired [illegible]
defendant said, "[illegible]
then remarked [illegible]
heard was Judge [illegible]
continued, [illegible]
agreed "between [illegible]
return the [illegible]
would pay [illegible]
in the corporation,
[illegible], or what is [illegible]
of "[illegible]," at [illegible]
an equal share, [illegible]
shares of common stock [illegible]
be issued by the [illegible]
T. Hardwick, [illegible]
a note for [illegible]
stock as [illegible]
upon this [illegible]
[illegible]ration for payment." [illegible]
don't like to let [illegible]
Judge interrupted by [illegible]
purpose of [illegible] the [illegible]
and then outside of [illegible]
colloquy:

"The Court: All right, I am going to ask him now to indicate what hiscdefense is to the note.

Mr. Melaniphy: Amended Paragraph 1, that is one defense. We have another defense, of a release, but this is one defense. That is on all fours with this 308 Illinois Supreme Court.

The Court: Under his pleadings --- I am inclined to think he is right, Mr. Melaniphy, and I think I will sustain his objection to the statement.

I think I will sustain the objection to the opening statement, of what you are going to offer to prove, because I don't think it can be done in law.

MR. Melaniphy: I am excepting, of course, to the ruling. Now, in order to save time, may what I have stated and what I now state be considered an offer of proof?

The Court: Yes.

Mr. Melaniphy: So that my record will be complete in that regard?

The Court: Yes, as well as what your pleadings show here.

Mr. Melaniphy: I want to make an offer of proof, and let what I have already stated in my opening, as to what we expect to prove, be considered part of my offer of proof, so that there will be no question about it. Otherwise, I will put my client on the stand, and I will go through every question and let your Honor rule on every question in the presence of the jury."

Mr. Platt then in substance said he would have to object to any evidence or any statements to the jury which might tend to lead them to believe there was a verbal agreement that somebody else was to be looked to for the payment of the note to the corporation, etc. The court then said that if what the attorney for defendant had said was the defense and all the defense was to be considered as an offer of proof, the court would sustain an objection to it.

"Mr. Melaniphy: Let me complete my offer so that there will be no question about it. The evidence will further show that Mr. Gelman surrendered his stock to the corporation, and that it was duly cancelled; and that thereafter fifty shares of preferred stock and twenty shares of common stock were issued by the corporation to C. F. Wendrick, Jr., and were endorsed by him, and that he signed the note dated November 29, 1938, the basis of the suit herein.

And at the time of said delivery of said stock and note, the evidence will show that Mr. Wendrick stated to Mr. Gelman, 'Now you know Morrie, that this is not a personal obligation, that you are to be paid by the corporation at the basis of $100 or more a month' and that Mr, Gelman stated that he well understood that, and that it was a corporation matter and not a personal matter with Mr. Wendrick."

Mr. Melaniphy then went on to state as a part of his offer that the corporation from November 15, 1938, up to August 22, 1940, had made payments to plaintiff by checks of the corporation amounting to the total sum of $2100, giving the amount of each check and stating "All of which checks were duly endorsed and cashed by Mr. Gelman and he received the proceeds thereof." The offer then continued:

"That thereafter about September, 1940, the corporation being somewhat in financial circumstances and the bankers who held certain accounts receivable pressing for payment, and the stockholders agreed to make an assignment for the benefit of creditors; that Mr. Gelman, his father and his attorney were in the offices of the corporation, and had knowledge of the fact before the assignment was made that the assignment was going to be made in lieu of a petition in bankruptcy; that an assignment was made to a trustee selected by the Chicago Association of Credit Men, Mr. Bonson, who took possession of all the assets of the corporation, and administered and liquidated them; and that at no time prior to the institution of this suit, which was in June, 1942, was any demand made by Mr. Gelman upon Mr. Wendrick for the payment of this note."

"The Court: The offer is considered by the Court and refused.

Mr. Melaniphy: That is, an objection thereto is sustained?

The Court: An objection is made and the objection is sustained.

Mr. Melaniphy: Do I understand that I can't even show the receipt of the payments of these checks?

The Court: If they would be applied on the note, then that is on there. If they would be applied on the agreement, or some other writing, or some other transaction, you can't go into it.

Mr. Melaniphy: The defendant further expects to show that thereafter, from November 15, down to and including May 8, 1940, that there was paid to the plaintiff Gelman, a series of checks totaling some $2100.

Mr. Platt: I thought that was objected to.

Mr. Melaniphy: And that was in payment in line with our defense."

It is earnestly contended by defendant that the court erred in excluding this offered evidence. It is said that the decision in Bell v. McDonald, 308 Ill. 329, is controlling and conclusive. The point at issue has to do with the so-called parol evidence rule. That rule is quite generally stated to be that oral, contemporaneous evidence is inadmissible to vary the terms of a written contract. It is quite true that the rule has many exceptions to it, so many that it has at times been doubted whether much of it is left. Northwestern Milling Co. v. Sloan, 232 Ill. App. 266. One of these exceptions is that stated in Bell v. McDonald, 308 Ill. 329. That exception is, we think, quite valid and reasonable. That was a suit upon a promissory note as is this. It was pleaded as one of the defenses thereto that the notes were delivered to the payee only as collateral security and upon the condition that the same should be held by him and be surrendered by him when the amount for which certain medicines, which were to be held and be sold by the payee, had been sold and the price therefor collected by him. It was urged by the plaintiff that the defense violated the parol rule. Judge Dunn, writing the opinion for the Supreme Court, said that evidence that the instrument was not intended to take effect as a valid obligation until the happening of some future contingency was usually held admissible between the original parties or those taking the notes with notice. We think it clear this case is not applicable here. It is quite true that delivery is necessary to the validity of any document, whether a note, a deed or a written contract between the parties. The offer to prove here did not go far enough. There was no offer to prove any defect in the complete delivery of the instrument or any condition attached to it. The offer of defendant was merely to show that the corporation which had not signed the note should pay it instead of

defendant, who had signed it. If there is anything left to the rule concerning parol evidence this offer would seem to be in contravention of it. We cite only a few authorities. American Jurisprudence, Vol. 8 §1058, pp. 635-6; Farmers State Bank & Trust Co. v. Parr, 234 Ill. App. 78; Handley v. Drum, 237 Ill. App. 587; Shiel v. Chicago Title & Trust Co., 262 Ill. App. 410; Hinsdale State Bank v. Lytle, 262 Ill. App. 151; Cusanelli v. Steele, 287 Ill. App. 490. Many other cases might be added. We hold the court did not err in excluding this evidence.

It is next contended the court erred in holding that a release offered in evidence was a special release only and not applicable to the note sued on and excluded it from evidence. The supposed release was under seal, was dated December 1, 1941, and was signed by plaintiff. The consideration for it was named as $595.00, and it purported to release defendant, his heirs, executors, etc. from all manner of actions, suits, debts, claims, etc, whether in law or in equity, "from the beginning of the world to the day of the date of these presents". The answer of defendant pleaded this release in bar of the note. The release was typewritten, but there was written into it in longhand and in the handwriting of defendant the phrase "on unsecured notes". It does not mention the $7,000 note sued on, which was a secured note.

We hold the general words of the release are limited in their effect by recitals therein (Bassett v. Lawrence, 193 Ill. 494) and this is generally true (Todd v. Mitchell, 168 Ill. 199; 53 Corpus Juris 1241, 1242; 45 American Jurisprudence, 691, 693).

There are other matters in the record throwing doubt on the applicability of this release as a defense to this particular note. It was introduced by counsel for defendant in the cross-examination of plaintiff and over the objection of plaintiff's attorney. The defendant testified. The release could have been well introduced on his direct examination, when he could have easily explained how it came about that he wrote the words "on unsecured notes" therein. Evidently he did not desire this

defendant, who [illegible]

rule concerning [illegible]

contravention of it. [illegible]

Insurance, Vol. [illegible]

Co. v. Ryan, 4 [illegible]

Ashel v. Ontario Table [illegible]

Bank v. Little, 188 [illegible]

[illegible]. Many other [illegible]

not are in exclusive [illegible]

It is [illegible]

release [illegible]

applicable to [illegible]

supposed rule [illegible]

was signed by [illegible]

1805.00, and it [illegible]

etc. From all [illegible]

in law or in [illegible]

of the date of [illegible]

this release in [illegible]

there was [illegible]

defendant [illegible]

the 7,000 [illegible] \ed

[illegible]

their effect by [illegible]

424) and this [illegible]

52 Corpus Juris [illegible]

There [illegible]

the applicability of [illegible]

note. It was [illegible]

examination of [illegible]

attorney. The defendant [illegible]

well introduced [illegible]

easily explained [illegible]

opportunity. That the release should have been introduced upon the direct examination of defendant or some of his witnesses who knew the facts is held to be the proper method in many cases. Wheeler and Wilson Mfg. Co. v. Barrett, 172 Ill. 610; Freehill v. Hueni, 103 Ill. App. 118; Meyer v. Johnson, 122 Ill. App. 87, and McKone v. Williams, 37 Ill. App. 591.

Defendant relies much on Brundage v. Gottschalk, 265 Ill. App. 260. This case was called to the attention ofvthe trial court, who held it not applicable to the facts here appearing. We agree.

Another matter is more serious. Twenty-nine checks made by the corporation to the order of plaintiff, amounting to a total sum of $2,144.50, cashed by defendant, were offered in evidence, and admission of the same was refused by the court. These checks showed the payment of that amount on the note and its receipt by plaintiff while holding the note. As was alleged in a pleading which had not been stricken, (although no formal plea of payment was filed,) a motion to strike the pleading showing these payments was denied. We hold the checks should have been admitted and credit given therefor. Attorney for plaintiff so conceded on the oral argument. The ruling of the trial court on this point was error. We find no other error in the record. If plaintiff will, therefore, within ten days frombthe filing of this opinion, file a remittitur of $2,144.50, the judgment will be affirmed; for $5,671.50 otherwise reversed and remanded.

AFFIRMED UPON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

O'Connor, P. J., and Niemeyer, J., concur.

42880

321 I.A. 610

LAWRENCE SCHIRO,
Appellee,

v.

WALTER J. CUMMINGS, as Receiver etc., et al., doing business as CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action to recover personal and property damages, alleged to have been sustained when a tractor and trailer which was being driven by plaintiff northbound on Emerald Avenue collided with an eastbound street car driven on Root Street, at about 8:15 A. M. on the morning of November 4, 1939, and upon trial by jury there was a verdict for plaintiff in the sum of $5,000, on which the court, overruling motions for judgment notwithstanding the verdict and a new trial, entered judgment, from which defendants appeal.

It is contended for reversal that plaintiff was not in the exercise of due care; that the damages awarded are excessive; that the court erred in its rulings on the admission of evidence, and in the giving and refusing of instructions.

The place of the accident (as already indicated) was at the intersection of Emerald Avenue and Root Street in the City of Chicago. Plaintiff Schiro was driving a truck with trailer attached north on the east side of Emerald Avenue. He was driving his equipment for the Roadway Express. He had started from St. Louis the evening before. He lived there. The truck was a Chevrolet with trailer attached. He had about 13,000 pounds of merchandise in the trailer, which he was carrying to the office of the Roadway Express in Chicago, which was at 4018 South Emerald Avenue.

Emerald Avenue was well paved and in good condition. Plaintiff's truck and trailer were about 33 feet long. Plaintiff had driven the route, which he knew well and the general conditions of the traffic. Root Street ran east and west. Two street car tracks were in it. Eastbound cars ran over the south track and westbound cars ran over the north track. At the southwest corner of the intersection of Emerald Avenue and Root Street a building stood flush right up to the corner. This morning the street car in question started from Halsted Street as usual, which was about 350 feet west of Emerald Avenue. Emerald Avenue was not a service stop for cars running on Root Street. This car proceeded east at a speed estimated by various witnesses at from 12 to 35 miles per hour. It was a one-man operated car, in charge of motorman Lawrence J. Stephens. Stephens says he picked up the passengers on the west side of Halsted Street, which was an intersecting street to the west. As he remembers he had two or three passengers, none of whom, however, testified. He says as he approached Emerald Avenue he sounded the bell, using his foot. He thinks he was going 7 or 8 miles an hour. He was on the front end of the car. He says when he passed the building on the west side of Emerald Avenue he looked south but did not see any vehicle approaching Root Street. When he got to the intersection at about the west curb of Emerald Avenue he noticed a big trailer and truck. He says it was going 25 or 30 miles an hour and as it approached the building line its spped seemed to him to increase. He says that he immediately threw on the emergency brake. Smart, a prospective passenger, who missed the car at Halsted, undertook to catch up with it. He says in his opinion it was going 25 miles per hour when it struck the truck. Plaintiff's tractor-trailer and the load which it carried weighed about 24,000 pounds. At the speed at which plaintiff says he was going he could have stopped his equipment in from 15 to 20 feet and could have made an emergency stop in 10 feet. Plaintiff was sitting in the

Emerald Avenue [illegible]
truck and trailer [illegible]
route, which he [illegible]
traffic. Not [illegible]
were in it. Westbound [illegible]
cars ran over the [illegible]
intersection of [illegible]
flush right up to the [illegible]
question started [illegible]
feet west of [illegible]
for cars running on [illegible]
speed estimated by various [illegible]
hour. It was a one-man [illegible]
Lawrence C. Stephens. [illegible]
the west side of [illegible]
to the west. As he [illegible]
of whom, however, testifies. [illegible]
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[illegible] or 3 miles an hour. [illegible]
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When he got to the [illegible]
Avenue he noticed a [illegible]
25 or 30 miles an hour [illegible]
speed seemed to him to [illegible]
on the emergency brake. [illegible]
the car at Halsted, [illegible]
opinion it was going [illegible]
tractor-trailer and [illegible]
pounds. At the speed [illegible]
have stopped his equipment [illegible]
made an emergency stop [illegible]

cab, about 6 feet back of the front part of the tractor. He says the street car was about 100 feet from the west curb line of Emerald Avenue when he first saw it. At that time he was at the south building line. The cab of his tractor was then over the south track. He says the street car was then going at a speed of 20 miles an hour. When he next looked he says the front end of the equipment had passed the south track and the street car was 30 feet away, going at about the same rate of speed. When hit, plaintiff's tractor was over the south track and the street car hit it about 15 feet from the front end of the truck. Both tractor and trailer were turned to the right. He did not notice any slackening of speed of the street car at any time.

Defendants do not argue on this record that the court should have held, as a matter of law, or that the jury should have held as a fact that there was no negligence on the part of the defendant. Their argument is that, as a matter of law, the court should have held that plaintiff was guilty of contributory negligence, and that an instruction for defendant should have been given to the jury at the close of all the evidence for that reason. Defendants argue that it is the duty of a person about to cross a dangerous place to approach it with care commensurate with the known danger; that due care requires looking when one can see, and that plaintiff drove up to the building line at the highest speed he could attain after turning into the street one block away; that he could have stopped in 10, 15 or 20 feet; that plaintiff saw the street car approaching when he reached the building line where he could see but made no effort to stop, but on the contrary continued on across the street car tracks at the same speed, leaving it to the motorman entirely to avoid a collision. It is said that this is under the law, as a matter of fact, contributory negligence. Cases far too numerous to be reviewed are cited and relied on,

cab, about [illegible]

the turnout on the north [illegible]

Dwarfie avenue when [illegible]

south building line. [illegible]

south turnout. [illegible]

of 20 miles an hour. [illegible]

of the equipment had [illegible]

50 feet away, [illegible]

plaintiff's tractor [illegible]

it about 14 feet from [illegible]

and trailer were [illegible]

alongside of [illegible]

Finding the [illegible]

have held, as [illegible]

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have held that [illegible]

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argue that it is the [illegible]

place to approach [illegible]

that due care [illegible]

drove up to the building [illegible]

after turning into the [illegible]

stopped in it, if or [illegible]

approaching [illegible]

but made no effort to do [illegible]

across the street car tracks [illegible]

motorman entirely to avoid a collision [illegible]

underlying law, as a matter of fact, [illegible]

cases for too numerous to be [illegible]

of which it will be sufficient to mention Russell v. Richardson, 308 Ill. App. 11, 22, and Walker v. Illinois Commercial Telephone Co., 315 Ill. App. 553,558.

Defendants argue that no one has a right to assume that there will not be violations of law or negligence by others, and then offer the assumption "as an excuse for failure to exercise care". Greenwald v. Baltimore & Ohio R. R. Co., 332 Ill. 627, 632; Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154, 159, are cited.

The temptation to lay down general rules in such cases is very great. As a matter of fact, it is quite difficult to do so. The question of whether a particular plaintiff, who undertakes to cross a street intersection in front of a moving car, is guilty of contributory negligence seems to be one of the class of cases in which the matter ought except in rare cases to be submitted to a jury on that issue of fact. There are numerous cases in Illinois which have held that the question of whether a party undertaking to pass over a street car track in front of an approaching car or train is guilty of negligence is for the jury. There are few of these cases on which all reasonable men would agree. The complexities of locomotion for either drivers or pedestrians in a city like Chicago are so many that it is usually held that each separate case presents a problem of its own for the jury, and we are quite disposed to hold that this was the case here. There is no doubt about the elementary propositions of law applicable. The vehicle plaintiff was driving was 33 feet long. When he arrived at the place where he could see the street car moving toward the east, he was required to make a decision and take all reasonable precautions to prevent a collision. Ordinarily the distance of the approaching car is one of the material facts which must be taken into consideration. The other is the speed at which it is approaching. Whether the driver of the vehicle crossing in front of a moving car has reason to believe that the car

of [illegible]

[illegible]

20. [illegible]

[illegible]

there will not [illegible]

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cars. [illegible]

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[illegible]

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ing car or their [illegible]

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The complexities of locomotion [illegible]

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[illegible]

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which it is approaching. [illegible]

ing in front of [illegible]

will slow up is another. In this case the plaintiff testified that he did not know that Emerald Avenue was a non-stop street for cars moving on Root Street and, as a matter of fact, he said that it had been the custom for the eastbound street cars to slow up as they approached Emerald Avenue. He testified that he knew if the car continued to come at the speed at which it was approaching, it would hit him but at that time his truck was over the south track and he was in a perfectly helpless situation.

The question we are called upon to decide here is not whether a jury might not have reasonably found that plaintiff was negligent. It is whether a court, irrespective of the verdict of the jury, may find, as a matter of law, that plaintiff was negligent and thus barred from recovery. In one of the latest cases, Gnat v. Richardson, 378 Ill. 626, 629, the Supreme Court says:

> "Whether it is negligence to cross a street car track at an intersection ahead of an approaching street car is a question of fact for the jury. (Loftus v. Chicago Railways Company, 293 Ill. 475; Chicago Union Traction Co. v. Jacobson, 217 id. 404.)"

To the same effect is Blum v. Getz, 366 Ill. 273, 277. That case involved the question of a pedestrian going in front of an automobile. The Supreme Court said:

> "if the automobile was far enough away at the time to have justified a person in the exercise of ordinary care to have acted as the plaintiff did, it would not necessarily indicate such a lack of care on the part of the plaintiff as would amount, in law, to negligence. The question of contributory negligence is one which is preeminently a fact for the consideration of the jury. It cannot be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of the jury which is provided for the purpose of deciding this as well as the other allegations in the case. As was stated in Thomas v. Buchanan, 357 Ill. 270: 'The question of due care on the part of the plaintiff's intestate is always a question of fact to be submitted to a jury, whenever there is any evidence in the record which, with any

will [illegible]

that we [illegible] got now

came moving on [illegible]

it had been [illegible]

they [illegible]

our continued to [illegible]

would hit him but [illegible]

and he was [illegible]

The question [illegible]

whether a jury might [illegible]

negligent. It [illegible]

the jury may [illegible]

and thus beyond [illegible]

Hindmarsh, 372 III. [illegible]

"Rather it [illegible]

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III. 472) [illegible]

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> legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased.'"

A case well worth reading in connection with any study of this subject is Chicago Union Traction Co. v. Jacobson, 217 Ill. 404, where the Supreme Court, speaking through Justice Cartwright, affirmed a judgment of the trial and Appellate Courts where the plaintiff, driving a team of horses, had moved across the path of a moving street car.

The actual question for determination in this case is whether at the time plaintiff reached the point on Emerald Avenue where he could see the street car moving east he could, in the exercise of reasonable care and caution, undertake to pass over the track on which it was moving. This was, we hold, a question of fact purely and solely for the jury. Defendants do not undertake to argue that they were free of negligence. We think an overwhelming preponderance of the evidence shows they were not. For a court to lay down as a general rule applicable to a state of facts like this the law for which the defendant contends would result in making it dangerous for everybody except the street cars to use the streets. As a matter of fact, cooperation and mutual care and forbearance is the only rule which makes such use possible.

The defendant argues in the next place that the damages allowed to the plaintiff by the jury are excessive. The verdict was for $5,000. Plaintiff was driving a combined tractor and trailer. It was loaded and the load and equipment weighed 27,000 pounds. The street car hit it with sufficient force to turn over the equipment and throw the driver out of the cab in which he was sitting, about 6 feet from the front of the trailer. The inside of the cab was constructed of metal. Plaintiff was thrown to the pavement. He was in a dazed condition. He says he didn't know what had happened. His feet and legs were pinned under the cab door. Someone (he does not know who) got him out. He tried to walk, as it now seems to him, The police ambulance came and took him to the Evangelical

Hospital at 54th and Morgan Streets, where he remained about five weeks. During all this time and afterwards he suffered much pain. His hospital bill was $172.45. He was given hypos to relieve his pain. His foot and leg were x-rayed. A plaster cast was put on his leg and another on his foot. For two weeks hypodermics were used. When he began eating he felt a drawing in the back of his neck, "some parts in back of the neck here, veins or something like that, run down the spine. It felt like when you had a tape on the back of your neck, otherwise when you put your head back, when you try to pull your head down". Dr. Kern was the outside doctor. Dr. Newman was interne and another whose name plaintiff does not know. Dr. Kern was present when the x-rays of the fibula and the metatarsal bones were taken, and they were developed while he was there. The x-ray shows a fracture of the right half of the fibula. It was a simple, not compound, fracture. There was also a fracture of the right metatarsal, right at the neck. There was a transverse fracture of the bone, all the way through. The foot was much swollen and bloodshot, ecchymosis. Sedatives were given. A week later he complained of pains in the neck. Analgesic was prescribed; also a electric pad. He complained that a pain ran up in the ear. After about four weeks the plaster casts were taken off and metal splints were put on. The patient was anxious to go to his home in St. Louis, and the doctor went along with him. The doctor told him he would have to go in a wheel chair. Other x-rays were taken. The doctor thought he had got a very fine result from his work. He saw him last on December 9, 1939. The doctor's charge was $50, which he says was a reasonable price for his services.

Plaintiff had a ringing in the ears, which medical men call tinnitus aurium. Plaintiff did not pursue his usual work and labor for about ten months. From the hospital he went to a rooming house for a night and then home to St. Louis. There consulted with Dr, A. H. Diher, who treated him for a month. Dr. Diher sent him to Dr.

Payne in St. Louis, who examined his throat, nose and ears. He then went to Dr. Smit, who examined and treated him. Later he went to Dr. Snitman. Dr. Snitman was a specialist in ears, nose and throat. The patient complained all the time of a ringing in both ears, which was worse at night. He said he noticed it first about two weeks after the accident, although it might have occurred before without his noticing it. The doctor made an examination for the cause with negative results. The doctor says it was even "grossly negative". He said he did not find any objective evidence of injury to any part of the head, meaning the ear, the nose and throat. The doctor on cross-examination, however, said: "Ringing in the ears is often associated with people who have no history of injury". Asked his opinion with reference to the continuance of this ringing, the doctor said he could not say with any degree of certainty; it might go away "or it may be the forerunner of deafness". A motion to strike this statement was denied, but the attorney for plaintiff agreed that it might go out.

Dr. Snitman, an expert witness called by the plaintiff, in response to a hypothetical question replied that in his opinion the ringing in the ears, or tinnitus aurium, might from a medical standpoint have been caused by the injuries which plaintiff received.

Plaintiff's hospital bill (as already stated) was $172.45. His doctor bill at the hospital was $50. He paid $10 for x-rays in St. Louis, and paid for the repairs on his tractor made necessary by the collision the sum of $119.85. When in health he was accustomed to make three trips a week from St. Louis to Chicago, for which he received pay at the rate of $25 for each trip. He was not able to return to his work for more than ten months. Considering all the pain he endured, the loss of his earnings, his hospital and doctor's bills, we do not think we can say that the amount of damages allowed by the jury was so excessive as to require action on our part. It was approved by the jury and the trial judge, who saw and heard the

[illegible] in St. Louis, [illegible]
went to Dr. [illegible], who [illegible]
Dr. Guitman. Dr. [illegible]
the patient compl[illegible]
was worse at night. [illegible]
after the [illegible] element, [illegible]
ing nothing it. [illegible]
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We said he did not [illegible]
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cross-examination, [illegible]
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statement was denied, but the [illegible]
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Dr. Guitman, an expert [illegible]
response to a hypothetical [illegible]
judging in the case, [illegible]
statement have been [illegible]
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[illegible]
the doctor call at the [illegible]
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pain he suffered, the [illegible]
Dalle, we do not think [illegible]
by the jury was no [illegible]
was approved by the jury [illegible]

witnesses.

Nor do we think there was substantial error in the rulings of the court on the admission of evidence. It is quite true that the court permitted Dr. Snitman to testify from purely subjective symptoms described by the plaintiff that he was afflicted with tinnitus aurium, but with the consent of the attorney for plaintiff this evidence was stricken out. However, evidence had already been given by the plaintiff to the effect that he was suffering from this malady and also by Dr. Smit, so that there could have been no substantial injury to the plaintiff's cause in this respect. There was medical evidence that plaintiff might have suffered an injury of the head in an accident such as that which occurred to him, which might well have brought on such an affliction without there being any objective indication of trauma to his head,

Defendant objects as to the bill which plaintiff had paid for repairing the equipment that there was no proof to show that he had not been reimbursed by the company for which he worked. As a matter of fact, this was not the objection made on the trial. The objection made on the trial was that plaintiff did not own the truck and that it belonged to the company. The contract in evidence, however, provided that the plaintiff, who operated the truck, was under the duty of paying for repairs and replacements and keeping the equipment in good repair. It is apparent, we think, the transfer of the truck and equipment to the Roadway Express Company was merely nominal, and that plaintiff was its actual equitable owner.

Defendants complain that a receipted hospital bill for a total sum of $172.45 was admitted in evidence, and there was no evidence that it was the reasonable, customary and fair charge, etc. We hold it was not error to admit this evidence. Cloyes v. Plaatje, 231 Ill. App. 183; Graham v. Dressen, 292 Ill. App. 15. See also King v. Meeker, 269 Ill. App. 57.

Defendants devote much space to alleged errors in the matter

witnesses.

Nor do we think there was [illegible] of the court on the [illegible] the court permitted [illegible] symptoms described by the [illegible] timation during, but when the [illegible] tiff this evidence was excluded out. However, evidence [illegible] been given by the plaintiff [illegible] from this malady and also by [illegible] been no substantial injury [illegible] There was medical evidence [illegible] injury of the [illegible] him, which might well have [illegible] being any objective indication of [illegible]

Defendant objects [illegible] for repairing the equipment [illegible] had not been reimbursed by [illegible] matter of fact, this was not [illegible] objection made on the trial. The objection made on the trial [illegible] and that it belonged to the [illegible] however, provided that the [illegible] under the duty of paying for [illegible] the equipment in good [illegible] of the truck and equipment [illegible] nominal, and that plaintiff [illegible]

Defendants complain [illegible] total sum of $72.45 was [illegible] evidence that it was the [illegible] We hold it was not error to [illegible] 231 Ill. App. 183; Higgins v. [illegible] King v. Meeker, 226 Ill. [illegible]

Defendants devote much space to [illegible] matter

of instructions. For instance, defendants object to plaintiff's given instructions Nos. 23 and 24, by which the jury was instructed that plaintiff might recover damages in case the jury found for him on the issues for the cost of repairing the trailer. Instruction No. 24 in particular said that they might include in such damages the reasonable rental value of a similar tractor and trailer. In view of the nature of the contract between plaintiff and his employer, we hold there was no error in these instructions. Defendant also complains of the giving of instruction No. 4, by which the jury was told that instructions constituted and connected body and series and should be so regarded and treated by the jury; that they should apply them to the facts as a whole and not detach or separate any one instruction from any of the others. The defendant argues this was erroneous because it conflicts with holdings of the courts in which it is said that a mandatory instruction which directs a verdict must contain in itself a correct statement of every element essential to the verdict directed and cannot be aided or cured by any other instruction. On this point defendant cites Hanson v. Trust Company of Chicago, 380 Ill. 194. ~~Defendants~~ Plaintiffs concede that ordinarily this is true but say that the rule is different where an instruction directs a verdict for either party or amounts to such a direction; that in such a case it must necessarily contain all the facts which will authorize the verdict directed. Plaintiff says the distinction between the instructions involved in those cases and the instruction in the instant case is that this one directs a verdict for defendant while the others do not. In the Hanson case the instruction directed a verdict for plaintiff. In this case the instructions which are directory and mandatory (namely, instructions Nos. 11 and 15) were submitted by the defendant and directed the jury to return a verdict in favor of the defendants. On what ground the defendants would have a right to complain of such an instruction we are at a loss to understand. We do not regard the case of Hanson v. Trust Company of Chicago as

of instructions. [illegible]
given instructions [illegible]
that plaintiff [illegible] recovers [illegible]
him on the issues for the [illegible]
No. 24 in particular [illegible]
the reasonable rental value of [illegible]
view of the nature of the [illegible]
we hold there was no error in [illegible]
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was told that instructions [illegible]
and should be no [illegible]
apply them to the facts in [illegible]
instruction from any of [illegible]
erroneous because it [illegible]
it is said that [illegible]
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Chicago, 280 Ill. [illegible]
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the verdict directed. [illegible]
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plaintiff. In that case the [illegible]
mandatory (based) [illegible]
the defendant [illegible]
the defendants. [illegible]
complain of such an [illegible]
do not regard the case of [illegible]

applicable here.

Defendants also complain that the court refused to give their instruction No. 26, also No. 28 as well as No. 29. The court quite fully instructed the jury as to the law in this case applicable to the facts and favorable to the defendants.

We do not find any reversible error and the judgment will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

applicable here.

Defendant [illegible] to [illegible] their instruction no. 20, [illegible] quite fully instructed the jury [illegible] to the facts and favorable [illegible]

We do not find any reversible error [illegible] be affirmed.

O'Connor, P. J., and Lawyer, J., concur.

42762

MARGERY A. HOGG and DOROTHY E. BROWN,
Appellants,
v.
FANNIE MAY CANDY SHOPS, INC., a corporation, also known as Illinois Fannie May Candy Company, also known as Chicago Fannie May Candy Company, and ROBERT INNES,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff Dorothy Brown, owner and occupant of a Chevrolet passenger automobile, and plaintiff Margery Hogg, driver of the automobile, brought suit for personal injuries sustained in a collision between the Chevrolet and a truck driven by the defendant Robert Innes, alleged to be the servant of the defendant Fannie May Candy Shops, Inc. The trial resulted in a verdict of not guilty as to both defendants, and plaintiffs appeal from the judgment entered on the verdict.

The collision took place at the intersection of 71st street and St. Lawrence avenue in Chicago about noon of a nice, dry winter day. The evidence is sharply conflicting as to the speed of the respective automobiles at and before the collision and as to the right of way at the intersection. The defendant corporation denied ownership of the truck and that the driver, Innes, was its employee or agent at the time of the collision. Plaintiffs object to the action of the trial court in refusing to permit a witness, whom they called for the purpose of impeaching defendants' witnesses, to testify, and also object to instructions given on behalf of defendants.

The defendant Innes was called by plaintiff for cross-examination under section 60 of the Practice act and as the last witness on

MARGERY A. HOGG and DOROTHY L. BROWN,

Appellees,

v.

FANNIE MAY CANDY SHOPS, INC., a corporation, also known as Illinois Fannie May Candy Company, also known as Chicago Fannie May Candy Company, and ROBERT INNES,

Appellees.

MR. JUSTICE MINTON [illegible]

Plaintiff Dorothy Brown, [illegible] of a Chevrolet passenger automobile, and plaintiff [illegible] of the Lincoln mobile, brought suit for personal injuries sustained in a collision between the Chevrolet and a truck [illegible] by the defendant Robert Innes. [illegible] alleged to be the servant of the defendant [illegible] Fannie May, [illegible] The trial resulted in a verdict [illegible] and plaintiffs appeal from the [illegible] verdict.

The collision took place [illegible] and St. Lawrence avenue in [illegible] day. The evidence is [illegible] respective automobiles [illegible] of way at the intersection. [illegible] ship of the truck and [illegible] ment at the time of the collision. [illegible] of the trial court in refusing to [illegible] for the purpose of impeaching [illegible] also object to instructions [illegible]

The defendant Innes [illegible] tion under section 60 of the Practice [illegible] on

behalf of the defendants. On examination in chief he testified that Mr. Bray, an investigator for plaintiffs, told him, "Now, if you should be asked who was at the crossing first, of course, the car was there before you," meaning, by the car, the Chevrolet. Defendants also called Clarence R. Agley, the manager of a grocery store located at the southeast corner of the intersection of St.Lawrence avenue and 71st street. This witness testified that he saw the Chevrolet coming south on St.Lawrence when it was 10 or 15 feet north of the building line; that it was traveling between 25 and 30 miles an hour; that it entered the intersection before the candy truck, which was traveling in an easterly direction on 71st street; that the Chevrolet seemed to increase its speed from the time he first saw it and that it swerved to the west, or right, about 4 or 5 feet, then pulled back toward the left; that the truck swung to the south, and the Chevrolet, continuing in a southeasterly direction, hit the left front part of the truck. On cross-examination the witness did not recall having seen Bray, the investigator, and denied saying to Bray that as he, the witness, was standing at the door his attention was called to the automobiles involved in the accident by a customer exclaiming, "They are going to collide," or words to that effect, and did not recall telling Bray that he personally had not observed either of the automobiles as they came to the crossing and did not know which arrived at the crossing first.

In rebuttal plaintiffs called Bray, the investigator, who stated his name, residence and connection with plaintiffs' counsel. Defendants objected to the witness testifying to any matter because he had been in the court room, if not all of the time, most of the time, and that at the commencement of the trial an order had been entered excluding the witnesses. Plaintiffs' counsel stated, without denial, that Bray had been in the court room during the early part of the trial but when it became apparent it would be necessary to use him

behalf of the defendants. On examination in chief he testified that Mr. Bray, an investigator for plaintiff, told him, "Now, if you should be asked who was at the crossing first, of course, the car was there before you," meaning, by the car, the Chevrolet. Defendant also called Clarence R. Apley, the driver of a crossing sign located at the southeast corner of the intersection of St. Lawrence Avenue and Flat Street. While witness testified that he saw the Chevrolet coming south on St. Lawrence when it was 10 or 15 feet north of the building line; that it was traveling between 25 and 30 miles an hour; that it entered the intersection before the early truck, which was traveling in an easterly direction on Flat Street; that the Chevrolet seemed to increase its speed from the time he first saw it; that it swerved to the west, or right, about 4 or 5 feet, then pulled back toward the left; that the truck swung to the south, and the Chevrolet continuing in a southeasterly direction, hit the left front part of truck. On cross-examination the witness did not recall having seen Bray, the investigator, and denied saying to Bray that he, the witness, was standing at the door his attention was called to the automobiles involved in the accident by a bystander exclaiming, "They are going to collide," or words to that effect, and did not recall telling Bray that he personally had not observed either of the automobiles as they came to the crossing and did not know which arrived at the crossing first.

In rebuttal plaintiff called Bray, the investigator, who stated his name, residence and connection with plaintiff's counsel. Defendants objected to the witness testifying to any matter because he had been in the court room, if not all of the time, most of the time, and that at the commencement of the trial an order had been entered excluding the witnesses. Plaintiff's counsel stated, without denial that Bray had been in the court room during the early part of the trial but when it became apparent it would be necessary to use him

he was sent from the court room and was outside during all of the testimony of Agley. The court sustained defendants' objection. Plaintiffs' counsel then made an offer of proof covering the matters he expected to prove by the witness Bray, including the following: That within a month after the collision Bray talked with Agley, who stated that his attention was directed to the street and intersection by a customer exclaiming, "They are going to collide," or some words to that effect, and that Agley then glanced out into the street just an instant before the collision; that the witness, Bray, talked with the defendant Innes on the afternoon of Monday of the week of the trial, when he asked Innes which of the cars had entered the intersection first, and that Innes replied that the Chevrolet automobile had entered the intersection prior to the truck which Innes was driving, and that Bray at no time suggested to the defendant Innes any testimony or any statement which the defendant Innes might or could make upon the trial.

Permitting a witness to testify after he has violated a rule excluding witnesses is a matter largely within the discretion of the trial court, and that discretion is to be interfered with on review only when it has been abused, to the injury of the party complaining. The tendency has been to permit the witness to testify unless the party calling him is in some way responsible for the violation of the rule. In Jones Commentaries on Evidence, vol. 6, sec. 2500, page 4948, it is said: "**** in this country, the decided weight of authority tends toward the view that, where the party is without fault but the witness disobeys the order for exclusion, the party ought not to be deprived of the testimony of his witness." In Palmer v. The People, 112 Ill. App. 527, 535, the court said: "We therefore hold that it is not a reasonable exercise of discretion for a trial judge to deprive a party of a witness who has heard testimony in violation of an order excluding witnesses from the court

he was sent from the court room and [illegible] the witness [illegible] testimony of Agley. The court [illegible] plaintiff's counsel then made a motion [illegible] he expected to prove by the witness [illegible]: That within a month after the collision [illegible] stated that his attention was attracted to [illegible] by a unknown automobile, [illegible] to that effect, and that [illegible] an instant before the collision; [illegible] the defendant Jones on the [illegible] trial, when he asked Jones which [illegible] section first, and that Jones [illegible] entered the intersection prior to [illegible] and that Grey at no time operated [illegible] testimony or any statement which [illegible] make upon the trial.

Permitting a witness to testify [illegible] excluding witnesses in [illegible] trial court, and that [illegible] only when it has been abused, [illegible] The tendency has been to [illegible] to testify [illegible] partly calling him in to [illegible] rule. In Jones Commentaries [illegible] 4048, it is said: "[illegible] authority tends toward the view [illegible] fault but the witness [illegible] ought not to be deprived of the [illegible]. In Palmer v. The People, [illegible] 364, [illegible] made: "We therefore hold that it is not [illegible] for a trial judge to deprive [illegible] has read testimony in violation of an order [illegible] from the con

room, unless such party or his attorney is in some way responsible for the violation of the order, or has connived at it or knowingly permitted it without objection, and that even in the latter case, a sound judicial discretion should lean to the admission of the testimony in all cases of doubt." To the same effect is Ewing v. Cox, 158 Ill. App. 25. In the instant case necessity for the testimony of Bray could only arise when plaintiffs' counsel learned or was put upon notice that witnesses for defendants would testify to matters which plaintiffs regarded as untrue. Plaintiffs would not be required to presume that defendants' witnesses would testify falsely and exclude Bray from the court room throughout the trial as a condition to making him a witness in rebuttal. Counsel's statement that Bray was sent from the court room when it became apparent to counsel that it would be necessary to use Bray, is not contradicted. Furthermore, it appears from counsel's statement that Bray was not in the court room when Agley testified, and presumably was not in the court room when Innes, as the last witness, testified to the matters as to which plaintiffs sought to impeach him. The question as to which of the parties first entered the intersection was an important one in determining which of the parties had the right of way, and the exclusion of Bray's testimony worked a great hardship upon plaintiffs. The trial court erred in excluding the testimony of this witness.

In objecting to defendants' instructions plaintiffs justly complain of the too common practice of repeating the same rule of law in several instructions. Objection is made to the giving of instruction 4 tendered by defendants, which directed a verdict of not guilty if the jury believed from a preponderance of the evidence that the plaintiffs were injured as a result of an accident which occurred without the fault of plaintiffs or defendants. In Cornwell v. Bloomington Business Men's Ass'n, 163 Ill. App. 461, the court said:

room, while [illegible]

for the violation [illegible]

permitted it [illegible] even [illegible]

a sound judgment I [illegible]

testimony in [illegible]

Cox, 150 Ind. [illegible]

testimony of any other [illegible]

or see and hear witnesses [illegible]

[illegible]

[illegible]

[illegible]

committed to the jury [illegible]

that they was sent from [illegible]

see and take it [illegible]

[illegible] more, it [illegible]

the court [illegible]

court room when [illegible]

as to which [illegible]

which of [illegible]

one in [illegible]

exclusion of [illegible]

the trial [illegible]

[illegible]

convicted of [illegible]

law in [illegible] I [illegible]

instructed [illegible]

guilty if the [illegible]

that the [illegible]

convicted without [illegible]

Bloomington [illegible]

"An accident, as defined by legal authorities, for which no liability exists is one which is the result of an unknown cause or is the result of an unusual and unexpected event happening in such an unusual manner from a known cause that it could not be reasonably expected or foreseen and that it was not the result of any negligence." There is no evidence in this case from which it could reasonably be inferred that the injuries sustained by plaintiffs were due to an accident. Each side charged the other with negligence, and the only reasonable inference that can be drawn from the evidence is that the collision was due to the negligence of one or more of the parties. There being no evidence to support the instruction, it should not have been given. Krawitz v. Levinstein, 320 Ill. App.618; Streeter v. Humrichouse, 357 Ill. 234; Mississippi Lime & Mat'l Co. v. Smith, 282 Ill. App. 361, 368. Moreover, the jury were told by other instructions tendered by defendants that proof of negligence by defendants, as charged, was necessary to plaintiffs' recovery, and the instruction here given was unnecessary. Nichols v. Commercial Truckers , 318 Ill. App. (abst.) 229.

Defendants' instruction 7 required plaintiffs to prove by a preponderance of the evidence that they were in the exercise of due care and caution for their own safety, and then proceeded to tell the jury that the fact of due care and caution by the plaintiffs was not presumed but "the plaintiffs must establish such fact by affirmative testimony or by facts and circumstances appearing in this case ***" Plaintiffs' objection to the use of the word "establish" as requiring too high a degree of proof seems without foundation, since "prove" is generally given among the definitions of "establish."

Plaintiffs object to the phrase "in any degree," used in defendants' instruction 9, which told the jury that even though it believed the defendants were negligent, they could not find the defendants guilty "unless you believe that a preponderance or greater

weight of the evidence shows that the plaintiffs were not guilty of any negligence which proximately contributed in any degree to the happening of the accident." The complaint is that by holding plaintiffs barred from recovery by negligence which proximately contributed "in any degree" to the collision, and by failing to use the phrase "in any degree" in instructions defining defendants' liability for negligence, a double standard of negligence was set up and a burden greater than was required of plaintiffs by the law was placed upon them. The use of such phrases as "in any degree," "in the slightest degree," "slightest neglect," "although by slightly," etc., is generally condemned, as shown in cases cited by us in Elmore v. Chicago Surface Lines, No. 42743, decided January 24, 1944. The phrase should not be used and it is particularly objectionable when used in reference to the negligence of only one of the parties.

We need not discuss plaintiffs' objection to defendants' instruction 11, which is based upon and quotes the statute relating to the right of way, as the instruction is confusing due to what is apparently an accidental omission of something necessary to give meaning to it.

Defendants seek to sustain the verdict and judgment by insisting that the plaintiffs failed to introduce any evidence tending to prove that the candy truck driven by the defendant Innes was the property of the defendant Fannie May Candy Shops, Inc., and that Innes was at the time of the collision in the employ of and engaged in the business of the corporate defendant. Part of the testimony of Innes tends to prove these facts. This is sufficient to make the question one for the jury.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

42816

CHICAGO TITLE AND TRUST COMPANY, as Trustee, Plaintiff below in cause No. 512555 and Defendant below in cause No. 43C1689,
Appellee,

v.

DELAWARE PLACE BUILDING CORPORATION, et al., Defendants below in cause No. 512555.

Appeal of B. E. SCHONTAG, Plaintiff below in cause No. 43C1689,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Chicago Title and Trust Company, as trustee of 20 East Delaware Apartments Liquidation Trust, filed its petition in case No. 512555, pending in the Superior court of Cook county, reciting that the decree in said cause entered on February 4, 1941, as of January 31, 1941, decreed, among other things, "V. That all bona fide proposals secured by reasonable deposits for lease or sale of the trust property be submitted to this court and approved by it prior to the execution thereof by the trustee;" that it had received an offer from Lois Cavanagh to purchase the property for $280,000, subject to the conditions of the written offer made an exhibit to the petition. The instructions of the court in respect to the offer were requested and on January 7, 1943 an order was entered directing the trustee to accept the offer and submit it to the certificate holders in accordance with the provisions of the trust agreement. January 20, 1943 the trustee sent a letter to all certificate holders advising them of the terms of the offer and stating as follows: "Although this letter specifically describes the offer made by Lois Cavanagh, it shall constitute a notice to you of any equal or better offer which may be received for the

property before this offer is finally accepted. If you do not object to this offer in the manner and within the time herein described, it shall be assumed that you approve this offer and any other equal or better offer that may be received."

The trust agreement under which the trustee was acting, after providing for notice to the certificate holders of the terms and conditions of any proposed sale or other disposition of the trust property, provided that "no such sale or other disposition shall be made if, within twenty (20) days from date of mailing such notice, the holder or holders of thirty-three per cent (33%) or more of the units outstanding represented by certificates of interest then outstanding of record, shall lodge with the trustee written objection to such proposed sale or other disposition." The contract with Lois Cavanagh provided that "In the event that on or before the date you (trustee) notify the undersigned (Lois Cavanagh) of the failure of 33% or more of the holders of units of interest under said trust agreement to file objections to the sale of the above premises on the terms herein set forth, you shall receive a bona fide offer in form acceptable to you for the purchase of said premises at a higher price than that provided herein, then at your option (to be exercised by written notice to the undersigned as hereinafter provided) this offer and your acceptance thereof shall be null and void **." The 20 day period within which certificate holders had the right to object to the proposed sale of the property expired on February 9, 1943. Written objections to the proposed sale were not filed by 33 per cent or more of the units outstanding.

On the day the right of objection to the sale expired, B. E. Schontag, appellant, delivered to the trustee her bid for the property in the sum of $305,755, deposited a cashier's check for $20,000 as evidence of her good faith, and offered to enter into a contract with the trustee similar to the contract outstanding between the trustee and Lois Cavanagh. Two days later Schontag demanded

property [illegible]
object to this [illegible]
described, it shall [illegible]
other equal or better [illegible]

The [illegible]
providing for a [illegible]
conditions of any [illegible]
property, provided th[illegible]
made if, within [illegible]
the holder or holders of [illegible]
units outstanding [illegible]
outstanding of a [illegible]
to such proposed sale or [illegible]
Iona Government [illegible]
you (that is) notify [illegible]
of 75% or more of the [illegible]
agreement to file [illegible]
the terms herein set forth, [illegible]
form acceptable to you [illegible]
price than that [illegible]
by written notice to the [illegible]
office and your [illegible]
20 day period [illegible]
object to the proposed [illegible]
1968. Written [illegible]
75 per cent or more [illegible]

On the day the [illegible]
Bromfield, [illegible]
party in the sum of [illegible]
$80,000 as evidence of [illegible]
contract with the [illegible]
the trustee and Iona [illegible]

tender of the title. This being refused, she filed in the Circuit court of Cook county a complaint alleging the facts stated above and asking that the trustee be directed to convey title to her. That cause was transferred to the Superior court and on February 19, 1943, on motion of the trustee, was ordered consolidated with cause No. 512555, and all proceedings thereafter were under the name and number of that cause. The trustee filed its answer, admitting the above mentioned allegations of the complaint and averring affirmatively that it had not accepted the offer of plaintiff and was not under any obligation to do so. On hearing on the complaint and answer the trial court found that the complaint failed to allege the formation of any contract between plaintiff and trustee; that the facts alleged by the complaint and admitted by the answer of the trustee disclose that Schontag had no enforceable contract with the trustee. The complaint was dismissed for want of equity. Schontag appeals.

The exact nature of the cause (No. 512555) of which the Schontag complaint became a part, does not fully appear from the record. Enough appears to show that the court in that case was retaining supervision of the liquidation trust under which the trustee held title and that all bona fide offers secured by reasonable deposits for the sale of the trust property should be submitted to the court for approval. Apparently it was because of these provisions in the decree in cause No. 512555 that the trustee procured the consolidation of the Schontag suit with the cause in which the court was supervising the trust. If upon consolidation of the causes we disregard the form, and look to the substance of the Schontag complaint in the light of the facts then before the court supervising the trust, the complaint was in effect a bid or proposal by Schontag, accompanied by a cashier's check for $20,000, to buy the trust property upon the same terms and conditions as the trustee had been authorized to sell it to Lois

tender of the it is. This being [illegible] court of Dona County, a complaint alleging [illegible] and asking that the trustee be discharged [illegible] cause was transferred to the superior court and [illegible] 1924, on motion of the trustee, [illegible] No. 21288, and all proceedings [illegible] number of that cause. The trustee [illegible] the above mentioned allegations of [illegible] affirmatively that it had not [illegible] was not under any obligation so to [illegible] and answer the trial court [illegible] allege the formation of any [illegible] that the facts alleged by the complaint [illegible] of the trustee disclose that [illegible] with the trustee. The complaint [illegible] demurrer appeal.

The exact nature of the [illegible] mortgage complaint became a part [illegible] record. Enough appears to show [illegible] retaining supervision of the [illegible] trustee held title and that all [illegible] able deposits for the sale of [illegible] mitted to the court for approval. [illegible] these provisions in [illegible] procured the cancellation of [illegible] which the court has more validity [illegible] of the causes we discuss [illegible] the mortgage complaint in the light [illegible] court supervising the trust, [illegible] or proposal by mortgagee [illegible] $20,000, to buy the trust property [illegible] ditions of the trustee and [illegible]

Cavanagh, but at a price $25,755 in excess of the price which Loiss Cavanagh was to pay. The right of the trustee to reject the Cavanagh bid upon receipt of a bona fide offer for a greater sum, at the time when the Schontag bid was presented, is expressly given in the Cavanagh proposal. No reason why, in the interest of the certificate holders the Schontag offer should not have been accepted in lieu of the Cavanagh offer, is suggested. The trustee stands upon the strictly legal proposition that it, the trustee, had never accepted the Schontag offer and therefore a complaint for specific performance would not lie. Technically this position is correct, but when the trustee brought the Schontag complaint before the chancellor who was administering the liquidation trust and made it a part of the cause in which the trust was being administered, the chancellor was privileged to look beyond the mere technical rights of Schontag and the trustee, to the rights of the certificate holders - the real parties in interest - to have the property sold at the highest obtainable price. As the terms and conditions of the Schontag offer, except as to the amount to be paid, were identical with those of the Cavanagh proposal, and the payment of the purchase price was to be in cash, ~~only~~ the amount to be paid should control. ~~create a preference in favor of one over the other.~~

The decree dismissing the Schontag complaint for want of equity is reversed and the cause is remanded with directions to proceed with a hearing on the complaint as a bid for the property, to the end that it - if the court should determine it should be sold - may be disposed of to the highest bidder for cash.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Matchett, J., concur.

Davenport, but at [illegible]
Davenport was to pay [illegible]
did upon receipt of [illegible]
when the conveyed [illegible]
Davenport pro cual [illegible]
notwithstanding [illegible]
of the Davenport [illegible]
strictly legal [illegible]
the borrowing office and [illegible]
would not lie. [illegible]
trustee brought the [illegible] complaint
the administration [illegible]
cause in which the trust [illegible]
was privileged to [illegible]
and the trustee, [illegible]
parties in interest - [illegible]
objectionable [illegible]
except as to [illegible]
Davenport proceed [illegible]
in cash, only the [illegible]
favor of one over the other.

The decree [illegible]
equity is reversed and the [illegible]
proceed with a [illegible]
to the end that it - [illegible]
may be discovered or to the [illegible]

[illegible]

C. Conner, [illegible]

42838

DAISY C. TEGTMEYER, Appellant, v. SUN INDEMNITY COMPANY OF NEW YORK, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

November 2, 1942 plaintiff brought suit against defendant as surety upon the official bond of Jesse D. Jackson, as clerk of the District Court of Des Moines County, Iowa, alleging that on May 20, 1935 Jackson converted to his own use a United States Liberty bond for $100 with attached interest coupons, theretofore deposited with him by plaintiff as security for costs in a certain case in the District Court of Des Moines County. Defendant filed a motion to dismiss the complaint, alleging among other reasons that the action was barred by the statute of limitations of Illinois and of Iowa. Plaintiff filed an amended statement of claim. Defendant's original motion to strike was permitted to stand against the amended statement of claim, and on March 12, 1943 defendant's motion to dismiss the suit was sustained. March 23, 1943, plaintiff filed her petition alleging that the order dismissing the suit prevented her "from exercising her right to file a secondly amended complaint setting up facts which legally excuse the apparent running of said statute," and praying that the order of dismissal may be vacated, "upon which vacation thereof she (plaintiff) will not object to an order striking from the files her amended statement of claim and giving her leave to file a secondly amended statement of claim within a reasonable time." The motion of plaintiff to vacate the order of dismissal was denied. Plaintiff appeals.

Plaintiff does not contend that the amended statement of claim was not subject to the objections raised against it by defendant's motion to dismiss. She insists that the order of dismissal should be vacated in order that leave might be granted her to file a "secondly amended statement of claim". No copy of the proposed amended statement of claim or showing as to its contents was presented to the court, and there is nothing before us upon which to predicate any judgment as to whether the proposed amendment, if permitted to be filed, would state a good cause of action. As said in Dilcher v. Schorik, 207 Ill. 528, 530: "A party is not entitled, as of right, to have leave to amend a pleading regardless of what the amendment is to be. A party who desires to file an amended pleading should prepare and submit it to the inspection of the court. There is no presumption that a proposed amendment will be a proper one, and it is not error to refuse to allow an amendment which is not presented and where there are no means of determining whether the amendment will be a proper and sufficient one or not. Jones v. Kennicott, 83 Ill. 484; McFarland v. Claypool, 128 id. 397." To the same effect is Fortier v. Fortier, 320 Ill. App. 626, 629.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

2.

[illegible]

claim is not analogous [illegible]

hardly [illegible] to [illegible]

should be [illegible]

a reasonably [illegible]

[illegible]

to the [illegible]

any [illegible]

be filed, [illegible]

[illegible]

have leave to [illegible]

[illegible]

are submit [illegible]

tion that a proposed [illegible]

to refuse to [illegible]

are no [illegible]

and [illegible]

v. Haywood, [illegible]

[illegible] III. [illegible]

[illegible] Judges [illegible]

[illegible]

42846

JOSEPHINE DURBIN, Appellee,	
v.	APPEAL FROM SUPERIOR COURT
SAM FERDMAN and BERNARD M. SHARPE, Defendants.	COOK COUNTY.
SAM FERDMAN, Appellant.	

~~336~~ 37

321 I.A. 642

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant Ferdman, lessee and operator of a four story building used for furnished light housekeeping and sleeping rooms, appeals from a judgment of $5,000 against him rendered upon the verdict of a jury in a personal injury action brought by plaintiff, a friend of a tenant in the building, who was injured November 24, 1940 while descending the stairway in the public hall near the first floor of the building after a visit to the quarters occupied by her friend.

Plaintiff claims that she tripped upon a metal strip on the stairway and fell, injuring her back about the center over the pelvic bone, across the hips down to the symphysis pubis, her knees and the back of her head. She was treated by a physician, who was deceased at the time of the trial, which was held in May 1943. In September 1941 the attending physician had an X-ray picture taken of plaintiff's ankles and back. This X-ray was not produced at the trial and plaintiff could not give any information as to where or by whom it was taken, except to state that it was taken somewhere on the south side of Chicago. The only medical testimony produced by plaintiff was that of Dr. Kaplan, who testified as an expert in taking and reading X-rays. For the purposes of the trial he took several X-rays, one of which according to his testimony

JOSEPHINE [illegible],
[illegible],

v.

SAM [illegible] and [illegible],
SH [illegible],
[illegible].

JAN [illegible],
[illegible].

[illegible]

Defendant [illegible] used for furnished light housekeeping [illegible] from a janitor of [illegible] a jury in a [illegible] of a tenant in the building, [illegible] while descending the stairs [illegible] of the building after a visit to [illegible] friend.

Plaintiff claims [illegible] stairway and fell, injuring [illegible] pelvic bone, [illegible] and the back of her head. [illegible] occurred at the time of [illegible] September 1941 [illegible] of plaintiff's mother [illegible] trial and plaintiff testified [illegible] by whom it was taken, direct to [illegible] on the south side of Chicago. [illegible] duced by plaintiff was taken [illegible] expert in taking and reading [illegible] he took several x-rays, one of which [illegible] trial [illegible] testimony

covered the lower portion of the spine and the pelvis, revealing definite evidence of a fracture about half an inch long and running diagonally upwards, extending through the lower portion of the sacral bone on the right side about three-quarters - half an inch to the right of the midline; that this fracture is not healed and there is no callus formation at that point. On cross-examination he testified that he could not tell from the film the age or length of time which the fracture may have existed, whether 1, 2 or 5 years; for all he knew it may have existed before November 1940 or it may have been incurred since that date. The plaintiff testified that she had never had any bones broken at any time other than the accident here involved; that from the time of taking of the X-ray, at the direction of her physician she had worn a belt or support; that if she bends down to scrub the floor or stays on her feet any length of time the leg gives way and gets numb and then it hurts her in her back and around her spine and side; that she had never tried to walk without the support. Dr. Kaplan was then asked the following question: "Where a fracture occurs, say a fracture around in 1940, November, and an X-ray plate taken in January or February, 1943, shows an ununited fracture - have you an opinion based upon a reasonable degree of medical certainty as to whether or not that condition is permanent or otherwise?" Over objection of defendant, who was not permitted to state the reason for the objection, the doctor was permitted to answer and state that he had an opinion, which was that the fracture was permanent; that if it hadn't healed in two years or more from the time the injury was sustained, he didn't think it ever would heal. Defendant's objection to the question is that it "was formed upon a supposed state of facts not supported by any evidence in the record," and "there is no evidence whatsoever to show that the fracture testified to by Dr. Kaplan as being shown in the X-ray film was sustained by the plaintiff at the time of her alleged fall on defendant's stairway."

covered the lower portion of [illegible]
definite evidence of [illegible]
diagonally upwards, [illegible]
record done on the [illegible]
to the right of the [illegible]
there is no [illegible]
testified that he took [illegible]
time which has [illegible]
for all is that it may have [illegible]
have been incurred [illegible]
she has never had any [illegible]
accident be a [illegible]
at the direction of [illegible]
that if the [illegible]
any length of time the [illegible]
her in her back and [illegible]
tried to talk without [illegible]
following question: [illegible]
around in [illegible]
February, 1[illegible]
based upon a reason [illegible]
or not that condition [illegible]
of defendant, who [illegible]
objection, the [illegible]
had an opinion, which [illegible]
it hadn't heard in the [illegible]
sustained, he didn't [illegible]
objection to the [illegible]
state of there not [illegible] "and the
is no evidence [illegible]
by Dr. Kaplan as [illegible]
plaintiff at the time [illegible]

Therefore, the only question before us on this objection is whether or not there is sufficient evidence in the record to warrant the assumption of the fracture occurring on November 24, 1940, the day of the accident.

Plaintiff was handicapped in proving her physical condition and the injuries sustained by her by reason of the fall because of the death of her attending physician. This, however, did not preclude the presentation of other evidence tending to prove those facts. In this case Dr. Kaplan testified that the fracture shown on the X-ray taken by him may have existed 1, 2 or 5 years. The plaintiff testified to pain in the region of the fracture immediately after the accident and to the continuance of pain, to disability in bending and in standing for a time and to the wearing of a belt or support. None of this evidence is contradicted. It was sufficient to authorize submission to the jury of the question as to whether or not a fracture resulted from her fall on the premises of defendant. Chicago Union Traction Co. v. May, 221 Ill. 530. It was therefore sufficient to justify the assumption in the hypothetical question of the fracture in November 1940. Whether the fracture did in fact result from plaintiff's fall was to be determined by the jury upon all the evidence, and from the verdict returned the jury undoubtedly found that the fracture was caused by the fall. There was no error in permitting the question to be asked and the answer given.

Defendant contends further that the evidence is insufficient to establish defendant's negligence, or due care and caution by the plaintiff for her own safety. No evidence was offered on behalf of the defendant. The plaintiff, the friend whom she was visiting and several others, including an employee of the defendant, testified to the defective condition of the metal strips on the stairway for some time prior to the accident. The employee testified that it was part of his work to repair these metal strips, and after being informed by the defendant that the plaintiff had fallen he took the whole bar of tin from the third step from the top, where plaintiff

Therefore, the only question before [illegible]
or not there is sufficient evidence in the record [illegible]
assumption of the fracture occurred [illegible]
day of the accident.

Plaintiff was [illegible]
and the injuries sustained by [illegible]
the death of her husband [illegible]
clude the presentation of [illegible]
In this case [illegible]
X-ray taken by him and [illegible]
testified to with in the [illegible]
the accident and to the [illegible]
ing and in admitting for [illegible]
None of this evidence is [illegible]
ize submission to the [illegible]
fracture resulted from [illegible]
Chicago Union Traction Co. v. [illegible]
sufficient to justify the [illegible]
the fracture in question [illegible]
result from plaintiff's [illegible]
all the evidence, [illegible]
found that the fracture [illegible]
in permitting the [illegible]

Defendant [illegible]
to establish defend [illegible]
plaintiff for [illegible]
the defendant. [illegible]
several other, including [illegible]
to the defective condition of [illegible]
some time prior to [illegible]
was part of his work [illegible]
informed by the defendant [illegible]
whole bar of tin from the [illegible]

claims she tripped; that when they get a whole lot of use they get loose and push up in front, and there was an opening for the sole of a shoe to get in front of it. The undisputed testimony is that at the time of the accident the hallway was not well lighted; that there was a window a little above the first landing on the first floor - a skylight window; that it is small and is a court window, and that it was dark; that after the accident the wife of the defendant came out with a light and connected it some place in the hall. Defendant's employee testified that when he was taking off the strips the defendant was there holding an electric light. Plaintiff testified that she was walking fast but was not running. This testimony made the negligence of the defendant and due care and caution on the part of the plaintiff questions for the jury, and we cannot say that the verdict was contrary to the manifest weight of the evidence.

Neither can we hold that the damages awarded were excessive, if, as the jury apparently found, plaintiff had suffered the fracture shown on the X-ray. She was in bed for several months, suffered considerable pain, had taken numerous heat or light treatments, had been wearing a belt to support her back for 18 months at the time of the trial, and there was evidence that the fracture, which apparently made the belt necessary, was permanent and not likely to heal.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

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CARL H. BURCKHARDT, Appellee, v. ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a corporation, Appellant.	)	OCTOBER TERM APPEAL FROM SUPERIOR COURT COOK COUNTY

357

A 38

32 I. App. 643

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of $27,500 entered against it in a personal injury action.

Plaintiff, employed as a laborer by the Carnegie-Illinois Steel Corporation, hereafter called the Steel comoany, was injured in the course of his employment when the last of 8 cars, being moved at the request of the Steel company by a switching crew of defendant from a bloomer mill of the Steel company, struck a large steel box which plaintiff had been filling with slag, causing the box to strike plaintiff and severely injure his left leg. There is no conflict in the material facts relating to the accident.

Plaintiff, after four years of high school in Germany and two years at the University of Heidelberg and Grimma by Leipsig, returned to this country in 1935; he worked in general and food chemistry in New York for several years and as a laboratory technician in bio-chemistry at the University of Chicago from January 1939 to October 1941; he also had experience as a machine and punch press operator; a little more than a month before the accident he began working as a laborer in and about the bloomer mill, where he was injured; for two weeks he had been a laborer at the slow cool deck; bloomers or billets came into the dock red hot; when cooled to a certain point they were loaded by crane into standard and narrow gauge cars; the standard gauge track on which defendant was operating comes into the building from the north and runs south into an adjoining

42855

GURR H. HUDSON,

Plaintiff,

v.

ALLIN, TOLLET [illegible]
COMPANY, a corporation,

Appellant.

MR. JUSTICE [illegible]

Defendant [illegible]

it in a personal injury action.

Plaintiff, employed [illegible]

Steel Corporation, [illegible]

in the course of his employment [illegible]

at the request of the [illegible]

from a blomer mill [illegible]

which plaintiff had been [illegible]

strike plaintiff and [illegible]

conflict in the material [illegible]

Plaintiff, after [illegible]

two years at the University [illegible]

returned to this country in [illegible]

chemistry in New York [illegible]

in bio-chemistry at the [illegible]

October 1941; he also [illegible]

operator; a little more than [illegible]

working as a laborer in [illegible]

injured; for two years he [illegible]

blomers or billets come into the [illegible]

certain point they were longer [illegible]

ears; the stanchions were [illegible]

into the building from the north [illegible]

room where a hopper car into which scale was loaded usually stood against a bumper at the end of the track; the narrow gauge track passes through the building from the south along the west wall. For about two hours before the accident plaintiff and several others had been engaged in shoveling slag, which had accumulated between the tracks, into the steel box involved in the accident; this box was about 10 feet long, 8 feet wide and 18 inches high and weighed about 500 pounds empty; it could be moved only by the crane; at the request of one of the men cleaning up it had been placed at the point where the moving car later came in contact with it. The Steel company gave directions for the moving of cars into and out of the mill. On receiving the order immediately preceding the accident the switching crew, with an engine, went to the track leading into the slow cool dock; about three or four hundred feet north of the building was a red light, between the rails of the track; this was a safety light for the workers at the mill, indicating there is something going on about the track; when taken away and set over to the side, it is a signal for a clear way for the train - that the track has been cleared of any obstacle; the engine foreman sent his field man to have the steel foreman or one of his helpers remove the light; the light having been removed by a steel company employee, the engine proceeded south, coupling onto three empty cars, then to four additional cars - the northerly car being partly in and partly out of the building, and then moved south about one and a half car lengths to couple to the hopper car at the bumper; as the train moved into the building the steel foreman told the men, including plaintiff, working between the tracks to move on the side so it would be safe to move the cars; he signaled the train crew that it was all right to couple onto the hopper car and to move out of the building; in the movement to couple to the hopper car and in the outward movement from the building one gondola car and

room where a hopper car into which coals are loaded usually stood against a bumper at the end of the track; the narrow gauge track passed through the building from the south along the west wall. For about two hours before the accident liability and several owners had been engaged in shovelling slag, which had accumulated between the rails, into the steel box involved in the accident; this box was about 10 feet long, 8 feet wide and 18 inches high and weighed, when empty, it could be moved only by the crane; at the request of one of the men cleaning up it had been placed at the point where the moving car later came in contact with it. The steel company gave directions for the moving of cars into and out of the mill. On receiving the order immediately preceding the accident the switching crew, with an engine, went to the track leading into the slow cool room; about three or four hundred feet north of the building was a red light between the rails of the track; this was a safety light for the workers at the mill, indicating there is something going on about the track; when taken away and set over to the side, it is a signal for a clear way for the train - that the track has been cleared of any obstacle; the engine foreman sent his fireman to have the steel foreman or one of his helpers remove the light; the light having been removed by a steel company employee, the engine proceeded north, coupling onto three empty cars, then to four additional cars - the northerly car being partly in and partly out of the building. At this moved south about one and a half car lengths to couple to the hopper car at the bumper; as the train moved into the building the steel foreman told the men, including [illegible], working between the tracks to move on the side so it would be safe to move the cars; he claimed the train crew that it was all right to couple onto the hopper car and to move out of the building; in the [illegible] to couple to the hopper car and in the outward movement from the building one coupler car and

part of a second car passed the steel box without contact; the hopper car was a side-dump car, with doors on the side opening outside of the track; the doors of the hopper car collided with the steel box and moved it around; plaintiff, who was standing by a narrow gauge car, 12 to 14 feet west of the standard gauge track, looking to the northeast - away from the box to the southeast - was caught between the box and the narrow gauge car.

The complaint charges that the movement of the cars involved in the accident was interstate transportation and that defendant was negligent in allowing the steel box to be so close to the railroad tracks that there was not sufficient clearance between the tracks and the box, and in failing to notify plaintiff "in sufficient time that there was insufficient clearance" between the box and the moving train. The defendant denied these allegations and alleged affirmatively that the movement of the cars was intrastate transportation - within the State of Illinois; that the plaintiff, the Steel company and defendant were under the Workmen's Compensation Act of Illinois and that all right of action by plaintiff against defendant was transferred to the Steel company, as his employer. If the movement of the cars was intrastate and not interstate, the rights of the parties are determined by the Workmen's Compensation Act and plaintiff has no common law right of action against defendant for negligently injuring him. Sections 3, 6 and 29. (Ill. Rev. Stat. 1943, Chap. 48, pars. 139, 143 and 166.) Goldsmith v. Payne, 300 Ill. 119; O'Brien v. Chicago City Ry. Co., 305 Ill. 244, 255-6; Johnson v. Turner, 319 Ill. App. 265.

There were 8 cars in the train movement - defendant's record showed 4 loaded cars and 4 empties, and that none were interstate cars. Harris, who was working with plaintiff, and Makowski, the crane man, both called by plaintiff, testified there were 5 loaded cars in the train; plaintiff then requested production of the records showing the

part of a second car [illegible]; the
car was a side-dump car, with [illegible]
the track; the doors of the [illegible]
and moved it around; [illegible]
car, 12 to 14 feet back of [illegible]
northeast - away from the box [illegible]
the box and the narrow gauge [illegible]

The complaint [illegible]
in the accident was interest [illegible]
negligent in allowing the [illegible]
tracks that there was not sufficient [illegible]
the car, and in failing to [illegible]
there was insufficient [illegible]
The defendant denied these [illegible]
the movement of the car [illegible]
State of Illinois; that [illegible]
were under the workmen's [illegible]
right of action [illegible]
Steel company, as his employer. [illegible]
intrastate and not interstate, [illegible]
by the workmen's Compensation [illegible]
right of action [illegible]
Sections 2, 6 and 29. (1[illegible]
143 and 160.) Goldsmith v. [illegible]
City Ry. Co., 305 Ill. [illegible] -) [illegible]

There were 9 [illegible]
showed a loaded car on the [illegible]
Harris, who was working [illegible]
both called by plaintiff, [illegible]
train; plaintiff then [illegible]

movement of the fifth loaded car; it was stipulated that the records produced by defendant of the movement of the 4 loaded cars were all the records the defendant had of loaded cars in the train; plaintiff then testified, over objection, that on returning from getting a drink of water, 10 or 15 minutes before he was injured, he came around the north end of the cars standing on the regular gauge track, that there were 5 loaded cars - 4 gondolas and a hopper; that on the gondola nearest the hopper was a card reading "Destination - Gary, Indiana." The record shows that cards placed on the side of a car are used to identify the car and designate its destination. The question of admissibility of similar testimony to prove the interstate character of train movements has been decided adversely to defendant's contention. In Kiefer v. Elgin, J. & E. Ry. Co., 351 Ill. 634, like evidence was received without objection. In Mitchell v. Louisville & N.R. Co., 375 Ill. 545, plaintiff, a switchman in defendant's yards at Covington, Ky., testified over objection that attached to one of the cars being moved at the time of his injury was a yellow card on which appeared the word "perishables", in red letters, and "Memphis Line, from Cincinnati, Ohio", in pencil, indicating that the car came from Cincinnati and was destined to or beyond Memphis, Tennessee. In holding this testimony competent the court said (550-551): "The foreman's description of the car, as containing perishables, unlike the statements found objectionable in cases cited by defendant, was necessary to plaintiff's selection of the intended car and, consequently to the performance of his work. Similarly, since the cars are classifie and switched in the yards according to directions found in their attached cards and other markings, plaintiff's testimony is admissible concerning the presence and meaning of the card on the car in question. (Kiefer v. Elgin, Joliet and Eastern Railway Co. supra.) Markings on cars are of the same nature as way-bills, and a witness, without producing the original records, may describe their contents as tending

to prove that the cars were employed in interstate commerce. (Wagner v. Chicago, Rock Island and Pacific Railway Co. 277 Ill. 114; McNatt v. Wabash Railway Co. 341 Mo. 516.) The evidence fails to disclose how defendant's foremen or their switching crews can locate or classify cars in its yards, without relying upon the authenticity of marks on the cars, in the absence of records of movements within the yards. Moreover, defendant, having failed and refused to produce any records or other evidence to show what cars were present in the yards on the night of the accident or were involved therein, cannot complain against the admission of the best evidence available to plaintiff, and every presumption and intendment will be indulged against defendant. International Sales Co. v. Industrial Com. 365 Ill. 436; Kaplan v. Stein, 329 id. 253; Baltimore and Ohio Railroad Co. v. Flechtner, 300 Fed. 318." In Wagner v. Chicago, R. I. & P. Ry. Co., 277 Ill. 114, cited in the Mitchell case, the court said (117): "The next ruling complained of is that the court refused to strike out testimony of the plaintiff that the cars were loaded with cotton-seed meal and came from Tennessee, when it appeared on cross-examination that he only knew where they came from by looking at the way-bills. The ground of the objection was that the way-bills were the best evidence. The rule of law is that one who is called upon to prove the contents of a writing must produce the writing or account for his failure to do so. But the way-bills did not come within that rule, not being documents executed between the parties to the suit or amounting to anything more than memoranda where the cars came from, of the same nature as marks on the cars tending to prove that the cars were employed in inter-State commerce. It was not necessary to produce the way-bills or records. Devine v. Chicago Rock Island and Pacific Railway Co. 266 Ill. 248." The testimony being competent, the question as to whether the movement of the train was interstate or intrastate was a question for the jury, which found in favor of plaintiff. We do not consider defendant's contention that this finding is against the manifest weight of the evidence, as we dispose of the case on other grounds.

There is neither evidence nor claim by plaintiff that defendant owned the tracks upon which the cars were being moved at the time of plaintiff's injury, or that defendant used or had any control over the use of the steel box. Defendant was operating over the tracks of the Steel company at its request; the steel box was used solely by the Steel company, and its employees directed the placing of the box. The cases cited in support of plaintiff's claim that defendant allowed the box to be placed too near the railway tracks are not applicable. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, was an action by an employee of the railroad for injuries sustained by coming in contact with a telegraph pole placed between two tracks in a switching yard which defendant was using under arrangements with the Illinois Glass Company, owner of the yard and tracks; the telegraph poles had been placed by the Glass company. The Supreme court held that it was immaterial whether defendant owned the premises in fee or was in possession as a lessee or licensee; that as plaintiff was engaged in defendant's business in helping to switch cars it was the duty of defendant to furnish its employees a safe place to work. In Wagner v. Chicago & Alton R. Co., 265 Ill. 245, plaintiff, an employee of the Burlington railroad, brought suit against defendant for injuries sustained by coming in contact with a semaphore post set in place and maintained by a joint interlocking system while engaged in switching cars for his employer, who was using the track as licensee of defendant. The Supreme court held that if the post was in dangerous proximity to the track it was negligence on the part of defendant to continue to operate trains or permit their operation by its licensee. The defendant, as owner of the tracks, owed the same duty to employees of its licensee as to its own employees to see that they had a safe place in which to work. The court cites the Illinois Terminal case and South Side El. R. Co. v. Nesvig, 214 Ill. 463, in both of which an employee sued his employer for injuries resulting from contact

There is neither [illegible]

defendant owned the tracks [illegible]

the time of plaintiff's injury [illegible]

control over the tracks [illegible]

the tracks of the [illegible]

used solely by the steel company [illegible]

placing of the box [illegible]

that defendant allowed the [illegible]

tracks are not applicable. [illegible]

III. 258, was an action [illegible]

sustained by coming in contact with [illegible]

two tracks in a switching yard [illegible]

ments with the Illinois Steel [illegible]

the telegraph poles had been [illegible]

court held that it was immaterial [illegible]

in fee or was in possession [illegible]

was engaged in defendant's [illegible]

the duty of [illegible]

In Wagner v. Union [illegible]

employee of the [illegible]

injuries sustained by [illegible]

place and maintained by [illegible]

switching cars for [illegible]

of defendant. [illegible]

proximity to the track [illegible]

continue to operate [illegible]

The defendant, as owner [illegible]

of its licensee [illegible]

place in which to work. [illegible]

and South Side el. R. Co. v. Ryan, [illegible] [illegible]

an employee sued his employer for injuries [illegible]

with dangerous obstructions placed near the railway tracks by others. They were decided against the defendants because as employers they were under obligation to provide a safe place for their employees to work. These cases support a right of action against the Steel company, as plaintiff's employer rather than against defendant.

In urging the liability of defendant, plaintiff insists that the box was so near the track that the switching crew knew, or in the exercise of ordinary care should have known that the collision between the box and the hopper car was an inevitable consequence of the movement of the cars. In attempting to absolve the Steel company from responsibility (a matter we consider immaterial) he says, "At the time of the occurrence of the accident it (the box) was near the track but not so near to it as to indicate any movement of the cars would disturb its position on the floor; the gondola cars did not come in contact with it as they passed by, and evidently defendant's switchman had no trouble in walking southward between the box and track to make the coupling with the hopper car." These positions cannot be reconciled. All know now that the box was too close to the tracks and that it did come in contact with the doors of the hopper car, but before the accident none of those in a position to observe thought that the box was too close. Harris, who was working with plaintiff in filling the box, testified that he did not know the box was obstructing the clearance of the hopper car so there would be a collision. Makowski, the crane operator who had set the box in position, said he thought there was sufficient clearance between the edge of the box and the standard gauge track. Plaintiff's testimony shows that he did not think there was any danger from a collision between the box and the hopper car, or it shows that he was grossly negligent; he knew the location of the box by working around it; when told by the foreman to move on the side so it would be safe to move the cars he stepped to a place where he had stood on other occasions when they were moving cars on the standard gauge railroad, and turned

with dangerous [illegible]
They were decided against [illegible]
were under obligation to provide [illegible]
work. These cases [illegible]
as plaintiffs' employers [illegible]

In judging the liability of [illegible]
that the box was so much [illegible]
in the exercise of ordinary care [illegible]
between the box and the [illegible]
the movement of the cars. In [illegible]
from responsibility (a matter [illegible]
time of the occurrence [illegible]
but not so near to it as to [illegible]
disturb its condition on the floor; [illegible]
contact with it as they [illegible]
had no trouble in [illegible]
the coupling with the [illegible]
All know now that [illegible]
come in contact with the [illegible]
none of those in a position to [illegible]
Harris, who was working [illegible]
he did not know the box [illegible]
car so there would be a collision. [illegible]
had set the box in motion, [illegible]
between the edge of the [illegible]
testimony shows that [illegible]
collision between the [illegible]
grossly negligent; [illegible]
when told by the foreman [illegible]
move the cars he [illegible]
when they were moving [illegible]

from the box and looked out of the building to the northeast; he did not see the hopper car strike the box; he knew as much about the size and shape of the hopper car as the train crew; he had an education and experience superior to that of the average laborer; he "was a stranger and wanted to know a little bit about the plant;" he testified that the hopper car involved in his accident was a side-dump hopper, the doors of which open up outside the track - the same kind he had usually seen there. Plaintiff and his two witnesses had a longer time in which to observe the proximity of the box to the tracks than did the switching crew; by the removal of the red light, admitting the engine crew to the premises, and the signal of the Steel company foreman that it was all right to move out of the building, the switching crew was impliedly assured by those primarily responsible for plaintiff's safety that the track was free of obstacles. As defendant and its servants were under no obligation to exercise a higher degree of care for the safety of the plaintiff than the plaintiff was under to exercise for his own safety, defendant cannot be guilty of negligence upon the facts in this case unless the plaintiff is equally guilty. The danger against which plaintiff claims defendant should have warned him was equally open to the observation and knowledge of plaintiff and defendant, and there was no duty on the part of defendant to give notice. Belt Ry. Co. of Chicago v. Manthei, 116 Ill. App. 330, Feeney v. Chicago City Ry. Co., 220 Ill. App. 400, Thomason v. Chicago Motor Coach Co., 298 Ill. App. 626 (abst.), and Glaum v. Cummings, 317 Ill. App. 655 (abst.). Belt Ry. Co. of Chicago v. Manthei, is particularly applicable. There plaintiff, an employee of the Stockham Manufacturing Co., was engaged in shoveling coal from a railroad track within the company premises so that cars on the track might be moved; in going to his work he stepped over a loose plank, one end of which was close to the track;

from the box and looked out [illegible]
not see the hopper car [illegible]
and shape of the hopper car [illegible]
experience superior to that [illegible]
and wanted to know a little [illegible]
the hopper car in close [illegible]
doors of which were [illegible]
seen there. Plaintiff [illegible]
which to observe the [illegible]
switching crew; by the [illegible]
crew to the premises, and [illegible]
that it was all right [illegible]
was impliedly assured by [illegible]
safety that the [illegible]
servants were under no [illegible]
for the safety of the [illegible]
for his own safety, defendant [illegible]
facts in this case unless [illegible]
against which plaintiff [illegible]
equally open to the [illegible]
and there was no duty [illegible]
Co. of Chicago v. Hunsant, 116 [illegible]
Ry. Co., 170 Ill. App. [illegible]
Ill. App. 629 (abst.), [illegible]
Belt Ry. Co. of Chicago [illegible]
plaintiff, an employee [illegible]
in shoveling coal from [illegible]
so that cars on the [illegible]
stepped over a loose [illegible]

defendant's switching crew came to move the cars; plaintiff stepped back from the track; in pulling out the cars the second car caught the plank, carrying it along and injuring plaintiff. After stating that plaintiff did not apprehend any danger from the plank, the court, in reversing a judgment for plaintiff, said (334): "The track was in the private yard of the Stockham Co., and owned by that company, as counsel for appellee admit, and it was maintained by that company. The omission of the appellant or its servants to notify appellee before the cars were moved that they were about to be moved, was not the cause of the accident, because appellee, without such notification, knew this, and took a position which he considered safe, and which, apparently, was safe. If the plank was negligently placed where it was at the time of the accident, the negligence was that of the servants of the Stockham Co., and that company, if any one, is liable, and not appellant." The court cited McInerney v. Delaware & Hudson Canal Co., 151 N. Y. 411, and L. E. & W. R. R. Co. v. Gaughan, 26 Ind. App. 1, each decided upon facts substantially similar to the present case and holding that there was no duty on the switching crew to notify the individual employees of the company in whose premises they were working. In the McInerney case plaintiff was injured when a switching crew entered the private yard of his employer to move cars at the employer's request; plaintiff contended that defendant did not discharge its whole duty by giving notice to the employer that defendant was entering the premises, and failing to notify the men actually engaged upon the work. The court said (416): "It would, doubtless, have been a careless and negligent act for the engine crew, upon being sent for, to have entered the yard of the plaintiff and begun the work of coupling and moving cars without notice to Willard (the employer) or his representative, but they discharged their whole duty to plaintiff and to all the regular employees in the lumber yard when they notified Willard on the day of the accident of their readiness to proceed with

[illegible]

his work, and thereupon entered the yard with the engine and coupled and moved the cars in obedience to his orders." In a similar situation in the Gaughan case, the court cited the McInerney case, and said (5): "Under the averments of the complaint in this case, the duty did not devolve upon the appellant (defendant railroad) to examine the premises of the Midland Steel Company and notify said company's employees that an accident might occur from the usual and ordinary manner of moving cars from the said company's yard. It was not the fault of appellant if appellee's master did not furnish him a safe and suitable place in which to work. Appellant was doing the work under the direction of appellee's master, and in the usual and ordinary way, using suitable and safe appliances, and in so doing it appellee was injured; * * It must follow then, that if in the prosecution of the work of handling the cars in the usual and proper way in the yards of the Midland Steel Company, the employees of said company are placed in more hazardous positions, the liability, if any, arising from the increased risk must fall upon said steel company."

Plaintiff further contends that defendant was liable because the switching crew violated defendant's Rule 144, requiring that " * * * when coupling onto or moving cars on any loading, unloading or repair track, he (the trainman) must walk along the track in advance of the cars and make sure that all men are out of the way and any obstructions removed." This rule was received in evidence over defendant's objection. We think the objection should have been sustained. Such rules are admissible in actions against the employer where the sufficiency of the rule is challenged, or in actions between the employer and its employee, but in actions between the employer and a third person a different question arises. As said in Hoffman v. Cedar Rapids & M. C. Ry. Co., 157 Iowa 655, 668: "But by what we regard as the decided weight of authority, as well as in accordance with sound reasoning, it has been held that in

his work, and therefore [illegible]
and moved the cars in question to his [illegible]
in the Gaughan case, the court [illegible] Coinman [illegible]
"Under the agreements of the [illegible]
devolve upon the employee (defendant [illegible]
of the Midland Steel Company [illegible]
an accident might occur from [illegible]
cars from the said company's [illegible]
if appellee's master did not [illegible]
which to work. [illegible]
appellee's master, and in [illegible]
and safe appliances, and in [illegible]
must follow them, that if in the [illegible]
the cars in the usual and proper [illegible]
Company, the employees of said company are [illegible]
positions, the liability, if any, [illegible]
fall upon said steel company."

Plaintiff further contends [illegible]
the switching crew violated defendant's rule [illegible]
when coupling onto or moving cars on any [illegible]
track, he (the trainman) must [illegible]
cars and make sure that all [illegible]
removed." This rule was received in [illegible]
We think the objection should have [illegible]
admissible in actions against [illegible]
rule is challenged, as in [illegible]
but in actions between the employer [illegible]
arises. As said in Hickman v. Chicago [illegible]
655, 658: "But by [illegible]
as well as in [illegible]

cases of injury to persons who are not charged with the knowledge of the company's rules, and who have not acted in reliance thereon, the rules of the company for the regulation of the conduct of its employees are not admissible in evidence for the purpose of showing that the company was liable on account of the violation of such rules as constituting negligence." The reason for rejecting the rules in actions by a third person is that the liability for negligence is fixed by the law and not by the rules. The employer may impose a higher standard by its rules than is imposed by the law, in the expectation that its employees may thereby be led to the exercise of greater care. In any event a penalty should not be imposed upon the employer where, as here, if plaintiff's construction and application of the rule is correct, the defendant required of its employees greater care and watchfulness for the safety of the steel company employees than was required by law. To the same effect is Streeter v. Humrichouse, 357 Ill. 234, 242-3, Carter v. Sioux City Service Co., 160 Iowa 78, 89-91, and McInerney v. Delaware & Hudson Canal Co., 151 N. Y. 411.

The judgment of the Superior court is reversed.

REVERSED AND JUDGMENT HERE FOR DEFENDANT.

MATCHETT, J. CONCURS.

O'CONNOR, P.J. SPECIALLY CONCURRING:

I agree with the result but not in all that is said in the opinion.

cases of injury to persons who are not [illegible] [illegible] of the company's rules, and who are not acted [illegible] [illegible] thereon, the rules of the company for the regulation of the conduct of its employees are not admissible in evidence [illegible] the question of showing that the company was liable on account of the violation of such rules as constituting negligence." The reason for rejecting the rules in actions by a third person is that the liability for negligence is fixed by the law and not by the rules. The employer may impose a higher standard by its rules than is required by the law, in the expectation that its employees may thereby be led to exercise greater care. In any event [illegible] is used [illegible] employer where, as here, it [illegible] of the rule is correct, the [illegible] care and watchfulness for the safety of his [illegible] company employees than was required by law. To the same effect is Bressler v. [illegible] 357 Ill. 284, 292-3, Gaffey v. [illegible], 193 Iowa 71, 89-91, and McInerney v. Delaware & Hudson [illegible], [illegible] 1. [illegible].

The judgment of the Superior Court is reversed.

REVERSED AND [illegible] FOR [illegible].

MATCHETT, J. CONCURS.

O'CONNOR, P.J. SPECIALLY CONCURRING:

I agree with the result but not [illegible] in the opinion.

42919

321 I.A. 644

GEORGE D. HARDIN,
Appellee,

v.

VILLAGE OF WESTCHESTER, a Municipal corporation, REUBEN N. NELSON, President of the Board of Trustees of said Village of Westchester, JAMES J. CROWLEY, RICHARD B. McCOPPIN, ARTHUR G. HINTZE, R.H. ALLISON, JAMES B. McGUAN and WILLIAM C. RILEY, Members of the Board of Trustees of said Village of Westchester, J. A. ROBERTS, Village Clerk of said Village of Westchester, and J. O. ALLISON, Village Collector and Village Treasurer of said Village of Westchester, and DR. ROBERT E. MacBOYLE, SLOVENE NATIONAL BENEFIT SOCIETY, an Illinois corporation not for pecuniary profit, ANNA STRIBRNY, A. B. LERITZ, FRED E. HOLMES, WEST SUBURBAN CONSTRUCTION COMPANY, an Illinois corporation, MARIE LONG, GEORGE A. ALLEN, ARCHIBALD WATSON, THOMAS G. RICHARDS, MADELINE C. TENNIE, ALEXANDER H. PHILLIPS, WILLIAM J. HANEMAN, FRANK A. SCHROEDER, MAE MAREK BESECKER, F. J. P. SEUL, F. W. ORLEMANN, FRANK A. ANDERSON, AGNES PICK, JOSEPH L. RODEN, J. M. GALLAGHER, CECIL E. BETZER, OLGA JORGENSEN, JAMES DIVIS, FRANCIS J. OTTO, G. H. PEMBERTON, ARTHUR H. MUNCH, MORRIS BATTAGLIA, BARNEY BRYNJOLFSSON, AGNES SCHAEFER, JOHN BAMBERG, LOUIS M. POTTS and MATT HUGHES,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants, the Village of Westchester, its officers, and 33 other individuals and corporations (owners of special assessment bonds and tax anticipation warrants issued by the village, and of real property in the village) who were permitted to intervene, appeal from four judgment orders entered in a consolidated cause that peremptory writs of mandamus issue forthwith, directed to the village and its officers, ordering and commanding them to proceed forthwith to prepare and adopt an ordinance for the refunding and extension of the time of payment of the unpaid install-

ments of Village of Westchester Special Assessments Nos. 10, 12, 42 and 52, and directing the village attorney to file a petition in the County court of Cook county requesting that such special assessments and the unpaid installments thereof be refunded and extended as provided in section 86a of the Local Improvement Act. This appeal and the appeal in Chicago Title & Trust Co., et al., Appellees v. Village of Westchester, et al., Appellants, (No. 42920, in which opinion is filed today) involving similar questions of law, were taken to the Supreme court and there consolidated by agreement of the parties for argument and opinion. That court held that the constitutional questions raised were no longer debatable, and transferred the cases to this court (383 Ill. 624), saying (p.633): "By the circuit court's order ordering the village to pass such an ordinance and to file such a petition, it has not in any way passed upon the right of the bondholders to have the bonds refunded and the assessments extended. It has merely ordered the village and its authorities to do something which the law compelled them to do. This court can see that some questions will arise as to the propriety of refunding the bonds and extending the assessments, but that is a matter over which the village and its officials have nothing to say, since the act required them to perform certain acts upon being petitioned by 75 per cent of the bondholders. The village has, in this case, attempted to substitute its opinion for the opinion of the county court and has by this appeal endeavored to have this court prejudge the case for the county court and to take away from the county court its right to pass upon the refunding and the extension proceedings."

The only question left for our consideration is the ruling of the trial court denying defendants' motion to have certain taxing bodies and districts, which had levied general real estate taxes upon all or part of the taxable property in the village, made parties defendant to this proceeding. These taxing bodies or dis-

[illegible]
menta of Village of [illegible]
42 and 52, and directing the [illegible]
in the County court of [illegible]
assessments and to [illegible]
extended as provided in [illegible]
This appeal was [illegible]
Appellees v. Village of [illegible]
in which opinion is filed [illegible]
were taken to the [illegible]
of the parties for [illegible]
constitutional questions [illegible]
transferred the cause to [illegible]
"By the circuit court's order [illegible] the village [illegible]
ordinance and to file such [illegible]
upon the right of the [illegible]
the assessments extended. [illegible]
authorities to [illegible]
This court can [illegible]
of returning the bonds and [illegible]
matter over which the [illegible]
say, since the [illegible]
petitioned by 75 per [illegible]
this case, attempted to [illegible]
the county court [illegible]
court [illegible]
the county court [illegible]
extension proceedings.

The only [illegible]
the total [illegible]
bodies and [illegible]
upon all or part of [illegible]
parties defendant to [illegible]

tricts are neither necessary nor proper parties. Here the only relief sought is against the village and its officers to compel them to institute proceedings in the County court where the rights of all parties affected by the refunding and extension of the assessments will be determined. This proceeding cannot affect the rights of the taxing bodies and districts which defendants would make additional parties defendant. Their situation is not unlike that of property owners when a writ of mandamus is sought against taxing bodies to compel the assessment of their property. In People v. Webb, 256 Ill. 364, an action of mandamus to compel the Board of Review to list for taxation certain omitted personal property, the court said (377-378): "We are of the opinion that the property owners are not necessary or proper parties to this mandamus proceeding. The mandamus, if awarded, will not conclude the property owners upon any question affecting their rights. They will have an opportunity to appear before the board of review when notified and show any cause they may have why the alleged omitted property should not be assessed to them. They have no interest, other than their general interest as citizens and taxpayers, in this proceeding." See also People v. Board of Appeals, 367 Ill. 559, 569-570.

The motion of appellee to dismiss the appeal, which was reserved to final hearing, is denied. The orders appealed from are affirmed.

ORDERS AFFIRMED.

O'Connor P. J., and Matchett, J., concur.

[illegible] are well established [illegible]
notice account is [illegible]
then to institute [illegible]
of all parties affected [illegible]
assessments will be [illegible]
rights of the [illegible]
made additional [illegible]
that of property owners [illegible]
taking bodies to [illegible]
People v. [illegible], [illegible] Ill. 604, [illegible]
Board of [illegible] to [illegible]
property, the court said (p. [illegible]):
the property owners are not [illegible]
[illegible] proceeding. [illegible]
the property owner [illegible]
They will have an opportunity to
when notified and [illegible]
omitted property [illegible]
late act, other than [illegible]
property, in this proceeding."
307 Ill. 369, 371-372.

The motion of appellee [illegible]
reserved to final hearing, [illegible]
affirmed.

O'Connor [illegible], and Dietzen, [illegible].

42220

CHICAGO TITLE AND TRUST COMPANY, a corporation, as Trustee under an Indenture made and entered into May 16, 1921, etc., et al.,

Appellees,

v.

VILLAGE OF WESTCHESTER, a Municipal corporation, REUBEN N. NELSON, President of the Board of Trustees of said Village of Westchester et al., and DR. ROBERT E. MacBoyle, SLOVENE NATIONAL BENEFIT SOCIETY, an Illinois corporation not for pecuniary profit, et al.,

Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants, who are the same as the defendants in Hardin, Appelee v. Village of Westchester, et al., Appellants, No. 42919 in which opinion is filed today, xxx appeal from a judgment order directing that a peremptory writ of mandamus issue, directed to the village and its officers, commanding them to take appropriate steps for the refunding and extension of the unpaid installments of Westchester Special Assessments Nos. 15, 23 and 38, as provided under section 86a of the Local Improvement Act. The questions involved are identical with those involved in the former case. Appeals in the two cases were taken to the Supreme court and by it transferred to this court. (383 Ill. 624.) Decision herein is controlled by the opinion in No. 42919.

The judgment of the Circuit court is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

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~~Ill. Unpublished Op.~~

321

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